Supreme Court, U.S.
FILED

No. 04-041062 FEB 3 - 2005

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In The

Supreme Court of the United States

STEVEN RUSHING,

Petitioner

v.

THE BOARD OF SUPERVISORS
OF THE UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

On Petition for A Writ of Certiorari
To the First Circuit Court of Appeal of
The State of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are a public employee's complaints regarding issues of professional funding processes and the repudiation of grievance procedures matters of "public concern" under this Court's ruling in *Connick v. Myers*, 461 U.S. 138 (1983), notwithstanding the partially private motivation for the speech?

2. Does an employer's conduct in suspending an academic with pay for eleven months and barring him from recourse to mandated grievance procedures constitute an actionable retaliation under 42 U.S.C. § 2000e-3(a), 42 U.S.C. § 12203(a), and 42 U.S.C. § 1983, even in the absence of direct causation of an EEOC filing with an adverse employment action?

3. Does a deprivation of a property right, cognizable under the Fourteenth Amendment, occur when a public employer significantly alters the professional duties of a public employee, refuses to follow a mandated grievance procedure, and then absolutely bars that employee from recourse to the grievance procedure?

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PETITION FOR WRIT OF CERTIORARI

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The May 14, 2004, opinion and judgment of the Louisiana Court of Appeal for the First Circuit is unpublished and reprinted herein. *See* App. 1a. Petitioner sought review in the Louisiana Supreme Court, and on November 8, 2004, such was denied. *See* 885 So.2d 1136 (La.2004); App. 26a.

The Louisiana Court of Appeal decision was in response to an appeal of an unreported judgment and bench ruling of the Louisiana Nineteenth Judicial District Court for the Parish of East Baton Rouge, dated March 17, 2003. *See* App. 23a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Louisiana Court of Appeal for the First Circuit, of May 14, 2004. Petitioner's request for review by the Louisiana Supreme Court was denied on November 8, 2004. App. 26a. The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

At issue in this Petition is the Due Process Clause of the Fourteenth Amendment, as well as the relevant antidiscrimination and non-retaliation provisions of the Civil Rights Act and the Americans with Disabilities Act. For the relevant statutory excerpts, see App. 27a–28a.

STATEMENT OF THE CASE

1. This is an action for declaratory and injunctive relief and damages brought by a tenured university professor,[1] Dr. Steven Rushing, against the Board of Supervisors of the University of Louisiana System (Southeastern Louisiana University) (*hereinafter* "SLU"). Dr. Rushing's claims arise out of his attempts to have several grievances heard by university officials. These grievances concern the process SLU uses for approving grants to faculty members for research and creative endeavors, the process SLU uses for processing grievances, and the terms and conditions of Dr. Rushing's tenured employment.

The terms and conditions of Dr. Rushing's employment with SLU were expressly agreed upon in writing. On September 15, 2001, Dr. Randy Moffett, Provost of SLU, sent a letter to Dr. Rushing confirming Dr. Rushing's tenured faculty appointment for the 2001–2002 academic year. This letter stated "the terms of your employment are stated in the Southeastern Louisiana University Faculty Handbook." This letter of agreement and the Faculty Handbook incorporated therein and adopted by reference thereby constitute the employment agreement between the parties.

The Faculty Handbook sets forth a contractual grievance procedure for the resolution of disputes as to the terms and conditions of employment of tenured faculty members. This grievance process provides for hearings at every step of the grievance process. Hearings are mandatory

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[1] The fact that Dr. Rushing was a tenured faculty member conclusively shows that his employment was not "at will." Thus, not only could his employment not be unilaterally terminated by SLU (except "for cause"), but also the terms and conditions of that employment could not be unilaterally changed.

at the initial stages of the grievance process.

2. On November 11, 1998, in accordance with the contractual grievance procedure, Dr. Rushing filed Grievance No. 1 against Julian Azorlosa, former chair of the Research and Grants Committee; Dr. Paul Riggs, the Director of the Office of Academic Services; the Office of Academic Services; the Office of Sponsored Research and Contracts; and the members of the Research and Grants Committee. The grievance was concerned with SLU's grant-approval process, which Dr. Rushing asserted lacks standards and is administered in an arbitrary and discriminatory fashion which disfavors certain individuals and groups of faculty members, particularly those in the arts. The grievance was unilaterally declared "abandoned" by the Grievance Committee, the University Provost and the University President. There is no basis for such a disposition in the grievance procedure. Dr. Rushing appealed this first grievance to the Board of Supervisors in accordance with the grievance procedure. The Board of Supervisors affirmed the action of SLU without providing Dr. Rushing with a hearing.

On December 16, 1998, Dr. Rushing filed Grievance No. 2 against Dr. Victor Bissonette, Chair of the Research and Grants Committee, which related to his denial of Dr. Rushing's request to bring concerns about grants funding before the September 11, 1998, meeting of the Research and Grants Committee. Grievance No. 2 was also unilaterally declared "abandoned" by the Grievance Committee, the University Provost, and the University President. Dr. Rushing then appealed his second grievance to the Board of Supervisors, which again denied him a hearing.

On January 22, 1999, Dr. Rushing filed Grievance No. 3 against the SLU Grievance Committee. In this grievance, he charged the Faculty Grievance Committee with the violation, misrepresentation, misapplication, and/or inequitable or otherwise improper application of the rules of

the University of Louisiana System. Both the Grievance Committee and the University Provost denied Dr. Rushing a hearing on this grievance. The University President declined to render a decision on this grievance. Dr. Rushing then appealed Grievance No. 3 to the Board of Supervisors, which once again denied him a hearing.

On March 7, 1999, Dr. Rushing filed Grievance No. 4 against Dr. Randy Moffett, Provost of SLU, for Dr. Moffett's failure to conduct a hearing on Grievances Nos. 2 and 3 in accordance with the Faculty Handbook, for not acting in good faith, for negligence, and for malfeasance in office. The Grievance Committee denied Dr. Rushing a hearing on this grievance.

On March 16, 1999, Dr. Rushing filed Grievance No. 5 against Dr. Sally Clausen, University President, for undermining his grievances, obstruction of his right to due process, and for unilaterally declaring his grievances "abandoned." The Grievance Committee denied Dr. Rushing a hearing on this grievance.

On April 11, 1999, Dr. Rushing filed Grievance No. 6 against the Chairman of the Music Department, Dr. David Evenson, regarding the removal of one of Dr. Rushing's students from his voice studio, which he considered to be a violation of his Academic Freedom.[2] Dr. John Miller, Dean of the College of Arts and Sciences, failed to respond to the grievance in accordance with SLU grievance procedures by not timely rendering a decision on the grievance.

University officials then began to retaliate against Dr. Rushing for filing these grievances. On April 26, 1999, Dr. Rushing was placed on forced leave with pay pending

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[2] On August 17, 1999, Dr. Rushing amended his sixth grievance statement against Dr. Evenson to include breach of contract and violations of Board of Supervisor's rules.

conclusion of an investigation of his "recent job performance and conduct towards students and colleagues." The alleged basis for suspending Dr. Rushing was an incident between him and another music professor, Dr. Scharmal Schrock, surrounding whether Dr. Schrock should take over the teaching of a student who had been taking voice lessons from Dr. Rushing. On April 13, 1999, Dr. Rushing and Dr. Schrock had an animated discussion in Dr. Schrock's studio, in the presence of the student. Following their discussion, Dr. Schrock apparently filled out a Victim/Witness Statement Form, in which she stated that Dr. Rushing told her in a telephone conversation later that day that he "cared enough about the integrity of this University to '...destroy it'," referring to writings of the British author/philosopher G.K. Chesterton.[3] Dr. Moffett testified that he suspended Dr. Rushing from his position as music professor based on this incident, without a hearing, pending an investigation.

After sending two letters to Dr. Moffett, dated July 24, 1999 and July 29, 1999, regarding the leave with pay which had been imposed, Dr. Rushing was eventually allowed to return to work on August 12, 1999, before an investigation had been completed and with a retraction of the forced leave. In August and September of 1999, an Ad Hoc Committee appointed by Dr. Clausen investigated the incident with Dr. Schrock. Dr. Rushing informed the committee that he made no personal threats to Dr. Schrock, the student, or the university. The comments made by Dr. Rushing to Dr. Schrock during the discussion on April 13 referred to Dr. Rushing's intent to expose certain key university officials for

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[3] G.K. Chesterton is a renowned Catholic theologian who in no way advocates violence. The reference was not meant as a physical threat of violence, but as a means of conveying a philosophical idea about education. In fact, the Ad Hoc Committee who later reviewed this incident found that Dr. Schrock knew Dr. Rushing did not intend physical harm.

obstruction of justice, violations of university regulations, and other grievable offenses. Following its investigation, the committee concluded that Dr. Rushing did not pose a "credible threat," which is defined by university policy as "a statement or action that would cause a reasonable person to fear for the safety of him/herself or that of another person, and in fact, cause such fear."

Nonetheless, the retaliation continued. Dr. Rushing filed suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge on September 13, 1999. The gravamen of his claims was that SLU officials attempted to frustrate his efforts to have his grievances heard, including claiming inaccurately that his grievances were improperly filed, and claiming inaccurately that grievances could not be made against certain individuals or committees.[4] On October 5, 1999, University President Sally Clausen ordered Dr. Rushing to undergo counseling for the purported purpose of helping him manage his anger, despite the fact that the findings of the Ad Hoc Committee had been reported to her and without determining that Dr. Rushing actually needed anger management therapy.[5] At the time, SLU knew that Dr. Rushing was already undergoing counseling for depression and that no health care provider had prescribed or recommended any treatment for anger management. Two days later, on October 7, 1999, Dr. Rushing's attorney wrote Dr. Clausen, questioning her order.

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[4] Dr. Rushing later amended his petition to include allegations that SLU attempted to employ economic coercion to force him to drop his grievances.

[5] In a subsequent letter, dated March 21, 2000, Dr. Rushing's treating physician, Dr. Gerald Heintz, wrote, "I do not feel that specific anger management training is needed as outward anger seems an infrequent problem." Dr. Clausen acknowledged receipt of the letter from Dr. Heintz, yet still did not reinstate Dr. Rushing until June 23, 2000, a full three (3) months later.

On October 19, 1999, Dr. Rushing filed Grievance No. 7, which concerned allegations of harassment and discrimination based upon his depression.[6] On November 2, 1999, SLU's attorney advised the SLU administration by letter to "cease participation in all grievance procedures involving Dr. Rushing during the pendency of the lawsuit filed by him."[7] This advice was accepted by the SLU Administration. On November 19, 1999, Dr. Rushing's attorney informed Dr. Clausen by letter that she had no authority to order Dr. Rushing into counseling for anger management and that she was invading his privacy in so doing. On November 23, 1999, Dr. Clausen placed Dr. Rushing on administrative leave with pay for failing to provide evidence that he had sought counseling for anger management by a licensed counselor. On December 21, 1999, Dr. Rushing's attorney sent Dr. Clausen a report which stated that Dr. Rushing was being treated for recurrent major depression. On January 6, 2000, Dr. Clausen placed Dr. Rushing "on administrative leave without pay, effective today, January 6, 2000."

On January 23, 2000, Dr. Rushing sent a Petition for Reinstatement and Grievance Hearing Against and Investigation of Dr. Sally Clausen (Grievance No. 8) to Mr. Bobby Jindal, who was then President of the University of Louisiana System. Dr. Rushing sought to be reinstated and to have Dr. Clausen investigated for due process violations regarding his suspension. The certified correspondence was returned unopened and marked "refused." On January 27,

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[6] Dr. Rushing later filed an EEOC charge against SLU which was relative only to those facts associated with Grievance No. 7 and disability discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA").

[7] Like the other contrivances utilized by the University to deny Dr. Rushing access to the contractual grievance procedure, there is no basis in the grievance procedure for such a position.

2000, Dr. Rushing sent a Memorandum in Support of his Petition for Reinstatement to Bobby Jindal. Again, the certified correspondence was returned, marked "refused."

On March 3, 2000, Dr. Carroll Falcon, Southeastern Louisiana University's Vice President of Academic Affairs, informed Dr. Rushing that he would not be granted a hearing on his Petition for Reinstatement and Grievance Hearing Against and Investigation of Dr. Sally Clausen, or any other grievance he had filed, until his lawsuit and prior grievances had been resolved. This letter stated, "[t]he Board is aware of your grievances currently pending at the University as well as the litigation involving your complaint. When these processes are exhausted, you may then appeal to the Board if resolution is not your satisfaction."

On May 1, 2002, Dr. Rushing submitted Grievance No. 9, which he amended on November 25, 2002, and which concerned a complaint regarding his work situation at SLU. Dr. Evenson refused to conduct a hearing on this grievance.

3. At the trial court level, Dr. Rushing presented substantial evidentiary support of his claims. Nevertheless, on March 17, 2003, the District Court granted the defendant's motion for summary judgment and dismissed all of Dr. Rushing's claims without a trial. App. 23a. Thereafter, Dr. Rushing perfected a devolutive appeal to the Louisiana Court of Appeal for the First Circuit. On May 14, 2004, the First Circuit affirmed the trial court's decision. App. 1a. However, Judge Edward J. Gaidry filed a vigorous dissent. App. 12a. Dr. Rushing's application for rehearing was denied on June 28, 2004. On November 8, 2004, the Louisiana Supreme Court denied Dr. Rushing's Application for Writs of Review. App. 26a. This timely Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S REVIEW IS NECESSITATED BY THE DEEP AND INTRACTABLE SPLIT IN AUTHORITY CONCERNING THE ROLE OF PRIVATE MOTIVATION IN DETERMINING WHETHER A PUBLIC EMPLOYEE'S SPEECH IS OF "PUBLIC CONCERN"

This Petition invites the Court to revisit the nettlesome question of what sorts of speech by public employees qualify as being of "public concern," for purposes of a retaliation claim under 42 U.S.C. § 1983 and the First Amendment. More specifically, this Petition raises—on a succinct and well-defined record—the precise question of whether a public employee's partially private motivation in raising certain issues of public interest disqualifies the speech from being of "public concern." This issue was specifically left open by this Court in its last foray on the subject of public employee speech, *see City of San Diego v. Roe*, 125 S.Ct. 521, 523–24, 525–26 (2004) (per curiam), and the Court should now take the opportunity to resolve a question that has vexed the jurisprudence of the courts of appeals and of state courts following federal decisional law.

1. The broad contours of this Court's public employee speech decisions are straightforward enough.

> A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment.... The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.

San Diego, 125 S.Ct. at 523–24 (internal citations omitted).

Connick v. Myers, 461 U.S. 138 (1983), establishes a two-step inquiry for the nature of public employee speech. In the first step, it is determined whether the particular speech is of "public concern," which the *Connick* Court very generally characterized as when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. If speech is determined to be of "public concern," then the second prong of the analysis comes into play. To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* and *Connick* Courts adopted a balancing test. *See Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968). It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461 U.S. at 142; *Pickering*, 391 U.S. at 568.

This Petition involves only the first prong of the *Connick-Pickering* test—the characterization of a public employee's speech as being of public concern. The Louisiana court, in rendering a decision here, ruled only that Petitioner's speech was (at least) partially privately motivated, and so "clearly a personal matter." App. 10a. The finding of the Louisiana court indicates that speech containing any element of private interest, however small, necessarily cannot also be of public concern and therefore protected by the First Amendment. That court, thus, did not reach the *Pickering* balancing inquiry.

2. With some sense of understatement, this Court has recently observed that "the boundaries of the public concern test are not well-defined...." *City of San Diego*, 125 S.Ct. at

525. Nonetheless, this Court has noted that

> *Connick* ... directs courts to examine the "content, form, and context of a given statement, as revealed by the whole record" in assessing whether an employee's speech addresses a matter of public concern.... [T]he standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present.

Id. at 525–26 (internal citations omitted). This Court also reiterated that

> [P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing.

Id. (internal citations omitted). *See also Connick*, 461 U.S. at 146 (speech of "pubic concern" is anything referring "to any matter of political, social, or other concerns of the community").

If this Petition merely sought this Court's guidance as to the application of the *Connick* "public concern" test in the context of a particular set of facts, it would justifiably not receive favorable consideration. Petitioner acknowledges that the *Connick* test is sufficiently fact-nuanced to be impervious to general rules and characterizations in most circumstances. Nevertheless, this Court's review is required here because the underlying question in many "public concern" cases for public employee speech—whether the employee statements have to be *exclusively* motivated by the public interest, or whether it is permissible for there to be *some* private motive

in their enunciation—remains unresolved. It is essential that this legal question be settled, because, as the *Connick* Court held, "[t]he inquiry into the protected nature of speech is one of law, not fact." 461 U.S. at 147–48 n.7.

3. The source of the conflict as to the role of private motivation or interest in making a public employees' speech of public concern, alas, can be traced to *Connick* itself. As noted above, the *Connick* decision appears to acknowledge that some sorts of "private remarks ... touch on matters of public concern," *City of San Diego*, 125 S.Ct. at 525–26 (citing *Connick* and *Rankin v. McPherson*, 483 U.S. 378 (1987)). At the same time, *Connick* explained that when an "employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." *Connick*, 461 U.S. at 147. This analytic dissonance in *Connick*, as to the role of private motivation or interest, has apparently created confusion and left unanswered questions among the courts of appeals and state courts. *Pool v. VanRheen*, 297 F.3d 899, 907 n.4. (9th Cir.2002) ("although *Connick* provides for a limited type of First Amendment protection, it is difficult to apply this nebulous standard"); *O'Conner v. Steeves*, 994 F.2d 905, 913 (1st Cir.1993) ("the courts of appeals have adopted various approaches for determining whether a topic of employee speech is of 'public concern,' under the ''threshold inquiry' required by *Connick*").

Out of this confusion has evolved a distinct split in authority as to the role of private motivation or interest in establishing speech as being of "public concern."[8] Some

[8] Indeed, it is by no means clear that the courts of appeals have resolved the question of whether a speaker's motives are, in fact, material. *Compare Conway v. Smith*, 853 F.2d 789, 796 (10th

courts have held that a personal aspect of private motive will not remove speech from the scope of public concern. *Henley v. Horne*, 297 F.3d 344, 347 (4th Cir.2002) (personal motive of an employee who engaged in conversations regarding a coworker's claim that she had been sexually harassed on the job by employee's supervisor did not remove the speech from the area of public concern); *Greer v. Amesque*, 212 F.3d 358, 371 (7th Cir.2000) ("a personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern, for purposes of determining whether the termination of a public employee for engaging in the speech violates the employee's First Amendment rights"); *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir.1994) ("a personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern"); *Thomas v. Beaverton*, 379 F.3d 802, 810 (9th Cir.2004) ("[b]ecause content is the most important factor, we have concluded that speech about a matter of public concern may be protected even when made in a private context").

A minority of decisions (including the one for which review is sought here) have held that speech that is in any way related to personal matters cannot be considered a matter of public concern, thus absolutely disqualifying speech that appears to have any private motivation or interest. This would constitute a far more stringent interpretation of "public concern." In these decisions, if the speech is in any way

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Cir.1988) (motivation of speaker is focus of public concern inquiry); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir.1987) (same); with *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir.1988) (content of speech is "notably overlooked" when courts focus on motivation of public employee); *Rode v. Dellacriprele*, 845 F.2d 1195, 1201 (3d Cir.1988) (same).

related to personal matters, even if it address matters of governmental misconduct, such speech can not be considered a matter of public concern. *See Farmer v. Cleveland Public Power*, 295 F.3d 593, 599 (6th Cir.2002) (speech that is of particular interest only to the speaker, unlike speech that touches on matters of public concern, cannot form the basis of a public employee's First Amendment retaliation lawsuit); *DeLlano v. Berglund*, 282 F.3d 1031, 1036 (8th Cir.2002) (speech of a personal nature contained in a letter complaining of governmental official's misconduct deemed not to be a matter of public concern); *Kemp v. State Bd. of Agriculture*, 803 P.2d 498 (Colo. 1990).

4. In this case, the Louisiana courts chose to align themselves with earlier jurisprudence of the U.S. Court of Appeals for the Fifth Circuit, holding that any private motivation or interest to the speech essentially disqualifies it from "public concern" status. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 372 (5th Cir.2000); *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269 (5th Cir.1992); *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 n.5 (5th Cir.1986). However, in the very recent case of *Johnson v. Louisiana*, 369 F.3d 826, 831 n.6 (5th Cir.2004), the Fifth Circuit retreated from this position and held, "Johnson may have been motivated in part by a personal dispute with Watson, but [a]n employee's speech may contain an element of personal interest and yet still qualify as speech on a matter of public concern."

Petitioner respectfully submits that application of the Fifth Circuit's earlier test impermissibly precluded his retaliation and First Amendment claim. As already noted, Petitioner's speech concerned the nature and extent of Respondent's commitment to professional funding processes for all faculty and creative staff at the University, particularly in the area of funding for the performing arts. *See* App. 2a, 25a. Additionally, Petitioner raised concerns about the

repudiation of the grievance procedures that applied to all of Respondent's faculty members. *See* App. 2a, 25a. To be sure, Petitioner had a personal stake in the issues he raised in the public forum of the University, and (in part) some of these issues arose out of particular personnel grievances he had with Respondent. Nevertheless, these issues were of public interest, insofar as they did not exclusively deal with "matters only of personal interest" to Petitioner, *Connick*, 461 U.S. at 147, and did implicate "matter[s] of political, social, or other concerns of the community." *Connick*, at 146.

Under *Connick*, courts should evaluate the totality of the speech at issue in determining whether it is of public concern. That is, the "content, form, and context ... as revealed by the whole record" should be examined. *Connick*, at 146–147. Had the case below been decided by a circuit or state court which adheres to *Connick*'s principles, Dr. Rushing's claim would have been given a proper, more thorough analysis. Instead, the court below, like many courts, short-circuited *Connick*'s full analysis by finding that any speech even partially motivated by personal interests or concerns could not be speech of public concern for purposes of retaliation or First Amendment violations. Not only does this subvert this Court's public employee speech jurisprudence, it also places insuperable barriers for expression in public offices and forums around the country, including the nation's public universities, which should be bastions of free and responsible inquiry. This Petition thus provides an excellent vehicle for the Court to resolve this threshold question for determinations of public employee speech that qualifies as being of "public concern."

II. THE REVIEW OF THIS COURT IS REQUIRED IN ORDER TO RESOLVE A SPLIT IN THE CIRCUITS CONCERNING THE TEMPORAL CAUSAL NEXUS WITH REGARD TO RETALIATION CLAIMS AND THE NATURE OF PROOF REQUIRED OF

ADVERSE EMPLOYMENT ACTIONS

1. The right to access to the courts and the right to petition government for the redress of grievances are protected by the First Amendment to the United States Constitution. The First Amendment also protects governmental employee's rights to participate in public affairs and to express themselves on matters of public concern. *Connick*, at 144; *Rathjen v. Litchfield*, 878 F.3d 836, 842 (5th Cir.1979).

Nevertheless, the Louisiana courts held that Dr. Rushing did not set forth a cognizable First Amendment retaliation claim, despite the overwhelming evidence that SLU had retaliated against Petitioner precisely because he exercised his right to freedom of expression. Dr. Rushing respectfully submits that the Louisiana courts erred in so holding, but, more importantly, the decision below reveals a significant fracture in authority on key threshold questions concerning the nature and timing of retaliation claims.

2. The Louisiana Court of Appeal reasoned that SLU had established a legitimate, non-retaliatory reason for suspending Dr. Rushing. Nevertheless, the reason proffered by Southeastern Louisiana University and erroneously accepted by the Court of Appeal as conclusive on a motion for summary judgment[9] does not explain the timing of the allegedly retaliatory actions in relation to the timing of Dr. Rushing's grievances and lawsuit.

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[9] Even though this case was decided by Louisiana state courts, under the Supremacy Clause of the United States Constitution, state courts must not interpose obstacles to the accomplishment of the full purposes and objectives of Congress as set forth in federal statutes. *Felder v. Casey*, 108 S.Ct. 2302 (1988). "The Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected." *Id.* at 2313–14.

Dr. Rushing filed his lawsuit on September 13, 1999. On October 15, 1999, Dr. Rushing was ordered to undergo anger management counseling. He filed his grievance No. 7 on October 19, 1999. On November 2, 1999, Southeastern Louisiana University "suspended" Dr. Rushing's contractual rights to the grievance process.[10] This was almost *seven months* after the incident involving Ms. Schrock and Dr. Rushing which occurred on April 13, 1999. This also was after Dr. Rushing had been reinstated on August 12, 1999, and approximately two (2) months after the committee reviewing the incident issued its report on September 2, 1999, finding that Dr. Rushing did not pose a "credible threat." On November 23, 1999, Dr. Clausen placed Dr. Rushing on forced administrative leave with pay. Therefore, in the course of a little over two (2) months after the filing of his lawsuit and grievance No. 7, Dr. Rushing was ordered to undergo counseling he did not need, his access to the contractual grievance process was "suspended," and he was placed on forced leave. This forced leave lasted for approximately eleven (11) months,[11] during which Dr.

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[10] Petitioner asserts that this suspension of his rights to the grievance procedures violated the First Amendment under Fifth Circuit precedence:

> The Constitution does not require a public employer either to establish a grievance procedure or to respond to grievances lodged by its employees.... Nevertheless, if a public employer voluntarily establishes a grievance procedure, then discriminates or retaliates against union members in administering that process, it violates the first amendment.

Professional Association of College Educators v. El Paso County Community College District, 730 F.2d 258, 263 (5th Cir.1984) (internal citations omitted).

[11] Dr. Rushing was on forced leave from April 26, 1999 through August 12, 1999, and again from November 23, 1999 through June 23, 2000.

Rushing was prohibited from not only teaching, but also from research and service activities and opportunities.

Despite the University's claim of a non-retaliatory motive, the United States Circuit Courts of Appeals have consistently held that a causal connection between the protected activity and the adverse personnel action can be inferred if the protected activity is followed closely in time by adverse action. *See, e.g., Thomas v. Beaverton*, 379 F.3d 802, 812 (9th Cir.2004) ("[t]he causal link between a protected activity and the alleged retaliatory action 'can be inferred from the timing alone' when there is a close proximity between the two"); *Coszalter v. City of Salem*, 320 F.3d. 968, 977 (9th Cir.2003) ("[d]epending on the circumstances, three to eight months is easily a time range that can support an inference of retaliation"); *Meyers v. Nebraska Health and Human Services*, 324 F.3d. 655 (8th Cir.2003); *Evans v. City of Houston*, 246 F.3d. 344, 354 (5th Cir.2001) (a "time lapse of up to four months has been found sufficient to satisfy the causal connection for summary judgment purposes"); and *Poole v. County of Otero*, 271 F.3d. 955 (10th Cir.2001).

The Louisiana court's ruling on the temporal nexus of First Amendment retaliation claims is thus contrary to the great weight of court of appeals authority.[12] To the extent that the Louisiana courts were relying on some contrary authority to establish some absolute, narrow time range in which retaliatory action must be initiated by an employer, in order to be actionable, such runs contrary to the majority view of courts.

3. Implicated in the Louisiana court's decision below was a ruling as to whether Petitioner had actually suffered an adverse employment action within the meaning of the relevant statutory and common law premises for retaliation

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[12] The U.S. Supreme Court has apparently never addressed the timing-inference issue.

claims. By ruling that Dr. Rushing's right to freedom of expression was not abridged when the University denied him access to the grievance process, App. 10a–12a, the implication is that he suffered no adverse employment consequences by reason of his speech. This ruling reveals an extraordinary split in the federal circuits as to whether the type of actions which were taken against Dr. Rushing by the University constitutes actionable retaliation under federal law.

The United States Court of Appeals for the Fifth Circuit[13] takes the position that in order for retaliation to be actionable, the employer must take an "adverse employment action" against the employee and that the "adverse employment action must be an "ultimate employment decision." *Mattern v. Eastman Kodak Co.*, 104 F.3d. 702, 705 (5th Cir.1997), *cert. denied*, 522 U.S. 932, 118 S.Ct. 336 (1997). According to the Fifth Circuit, "ultimate employment decisions" include acts such as hiring, granting leave, discharging, promoting and compensating. *Id.*; *see also*, *Brazoria County, Texas v. Equal Employment Opportunity Commission*, 391 F.3d 685 (5th Cir.2004); *Zaffuto v. City of Hammond*, 308 F.3d 485 (5th Cir.2002), *on reh'g*, 313 F3d. 879 (5th Cir.2002); *Dollis v. Rubin*, 77 F.3d. 777 (5th

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[13] Louisiana state courts typically follow the jurisprudence of the United States Court of Appeals for the Fifth Circuit in adjudicating issues of federal law. In *Chase v. Louisiana Riverboat Gaming Partnership*, 30,368 (La.App. 2 Cir.2/25/98), 709 So.2d 904, the Louisiana Court of Appeal for the Second Circuit stated, "where ... the precise issue before us has been dispositively addressed in the intermediate federal appellate court that covers the same geographical area as this court, we should be extremely hesitant to differ with the federal court." *Chase*, at 908 (*quoting Gaspard v. Transworld Drilling Co.*, 468 So.2d 692 (La.App. 3 Cir.1985), *writ denied*, 474 So.2d 1304 (La.1985), *cert. denied*, 475 U.S. 1067, 106 S.Ct. 1382 (1986).

Cir.1995). Only the Eighth Circuit sides with the Fifth Circuit on this issue. *See Ledergerber v. Stangler*, 122 F.3d. 1142 (8th Cir.1997).[14]

The First, Fourth, Sixth, Ninth, Tenth and Eleventh Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. *See, e.g., Wideman v. Wal-Mart Stores*, 141 F.3d. 1453 (11th Cir.1998); *Stauropoulis v. Firestone*, 361 F.3d 610, 616–17 (11th Cir.2004) ("[t]o be considered an adverse employment action for purposes of Title VII's anti-retaliation provision, the action must either be an ultimate employment decision or else must meet some threshold level of substantiality"); *White v. Burlington Northern and Santa Fe Railroad Company*, 364 F.3d 789 (6th Cir.2004); *Von Gunter v. State of Maryland*, 243 F.3d. 858 (4th Cir.2001); *Berry v. Stevinson Chevrolet*, 74 F.3d. 980 (10th Cir.1996); *Wyatt v. City of Boston*, 35 F.3d. 13 (1st Cir.1994); *Welch v. Derwinski*, 14 F.3d 85 (1st Cir.1994); *Passer v. American Chemical Society*, 935 F.2d. 322 (D.C.Cir.1991); and *Yartzoff v. Thomas*, 809 F.3d 1371 (9th Cir.1987).

In *Coszalter v. City of Salem*, 320 F.3d. 968, 975–76 (9th Cir.2003), the Court set forth what petitioner believes to be the correct inquiry in determining whether there is actionable retaliation in response to the exercise of First Amendment freedoms:

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[14] In *White v. Burlington Northern and Santa Fe Railroad Company*, 364 F.3d 789 (6th Cir.2004), the Sixth Circuit observed that, while the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, it has consistently applied a broader standard, citing *Manning v. Metropolitan Life Insurance Company*, 127 F.3d 686, 692 (8th Cir.1997), and *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir.1997). *See also Meyers v. Nebraska Health and Human Services, supra*, at 660, in which the Eighth Circuit applied a broader standard in a § 1983 action.

> Various kinds of employment actions may have an impermissible chilling effect. Depending on the circumstances, even minor acts of retaliation can infringe on an employee's First Amendment rights.... To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden.... The relevant inquiry is whether the state had taken "action designed to retaliate against and chill political expression."

The "ultimate employment decision" requirement which is imposed by the Title VII jurisprudence of the Fifth and Eighth Circuits is inconsistent with the statutory texts of 42 U.S.C. § 2000e-3(a) and 42 U.S.C. § 12203(a), which simply make unlawful to "discriminate" in reprisal for protected activity, as well as the remedial purposes of these statutes.[15] *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d at 1456. *See also*, *White v. Burlington Northern*, 364 F.3d at 801–02.

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[15] Indeed, the Fifth Circuit recognizes that the "ultimate employment decision" requirement is inconsistent with other courts of appeals, as well as with rulings from the U.S. Supreme Court. For example, in the case of *Kang v. Board of Supervisors of Louisiana State University*, the three judge panel stated, "we have ourselves noted that 'the continuing vitality of the "ultimate employment decision" doctrine is questionable in the light of' recent Supreme Court decisions." 75 Fed.Appx. 974, 977, 2003 WL 22272920 (5th Cir.2003). That panel, however, declined to overrule the "ultimate employment decision" doctrine until that doctrine was "overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting en banc." *Id.*, *citing Central Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir.2001).

The anti-retaliation jurisprudence of the Circuit Courts under 42 U.S.C. § 1983 is even broader than the majority position of the circuits under Title VII. *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570 (5th Cir.2003); *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir.1999). In *Meyers v. Nebraska Health and Human Services*, the Eighth Circuit held, in a § 1983 action, that "to be actionable, the employment action must be 'a material change in the terms or conditions of her employment.'" *Meyers*, at 660. The Eighth Circuit went on to conclude that whether changes in the intangible employment conditions were significant or material remains a disputed issue of material fact for the jury to decide.

Moreover, the position of the Fifth and Eighth Circuits as to Title VII retaliation is inconsistent with the holding and rationale of this Court in *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997). *See Brazoria County, Texas vs. EEOC*, 391 F.3d 685 (2004), J. Pickering dissenting. *Robinson* held that a terminated employee could bring a post-employment retaliation suit against the employee's former employer for giving an unfavorable letter of reference. *Robinson*, at 339. Justice Thomas wrote for a unanimous Supreme Court:

> According to the EEOC, exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims. Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: *Maintaining unfettered access to statutory remedial mechanisms.*

Id., at 345–46 (citations omitted) (emphasis in original). Dr. Rushing respectfully submits that the actions taken against

him by SLU were certainly much more serious actions of retaliation than the negative reference letter at issue in *Robinson*.

Moreover, the "ultimate employment decision" requirement is inconsistent with EEOC guidelines. The EEOC has interpretated the term "adverse employment action" in the context of a Title VII retaliation claim to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected conduct." *EEOC Compliance Manual*, § 8000 (1998). Although EEOC guidelines are not binding on the courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161 (1944)); *White v. Burlington Northern & Santa Fe Railroad Co.*, *supra* (en banc). Courts have frequently drawn guidance from the EEOC Compliance Manual. *See*, *e.g.*, *Bradgon v. Abbott*, 524 U.S. 624, 646–47, 118 S.Ct. 2196, 2209 (1998); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir.1996); and *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847, 856 (5th Cir.1999).

The EEOC disagrees with the conclusion that an adverse action must qualify as an "ultimate employment decision" or must materially affect the terms or conditions of employment to constitute retaliation. *See id.* "The retaliation provisions set no qualifiers on the term 'to discriminate', and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity," *Id.*, *citing Knox v. State of Indiana*, 93 F.3d 1332, 1334 (7th Cir.1996) ("[t]here is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint"), *and citing Passer v. American Chemical Society*, 935 F.2d 322, 331

(D.C.Cir.1991) (the anti-retaliation provision in Title VII does not "limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion"). Indeed, the EEOC Compliance Manual specifically provides in Section 8-II.D.1 that "[s]uspending or limiting access to an internal grievance procedure also constitutes an 'adverse action.'"

5. The Louisiana Court of Appeal also held that Dr. Rushing had the burden of proving that "but-for" the protected activity, the adverse employment actions would not have occurred. *See* App. 11a (citing *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir.1999)). However, the "but-for" causation rule cited by the Court of Appeal is clearly inconsistent with *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003). Under the mixed-motive analysis, the fact that the adverse employment actions may have been motivated by a legitimate reason (*i.e.*, the Schrock incident) does not preclude the fact that these actions may also been motivated by an illegitimate reason (*i.e.*, Dr. Rushing's grievances).[16] Here, the Louisiana appellate court integrated an actual "but-for" test, placing the entire burden on the plaintiff, with no analysis of whether there was a mixed motive or proof of a pretext. Indeed, using the state court's view, there is no possibility of burden-shifting, directly in

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[16] Even so, the U.S. Court of Appeals for the Fifth Circuit continues to use the "but-for" language, thus indicating to Louisiana state courts that "but-for" is the proper standard. *See, e.g., Machinchick v. PB Power, Inc.*, 2005 WL 138708, n.33 (5th Cir.2005) (citing *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir.1995)). The Fifth Circuit, post-*Desert Palace*, has continued to give lip-service to a "but-for" test, without actually enunciating a substitute standard. The reality, however, is that the burden of proof under *Desert Palace* is quite different than the standard imposed by the Louisiana First Circuit Court of Appeal in this case—a result of the confusion within the federal court of appeals as to the language to be employed when referring to the proper standard.

contradiction of *Desert Palace*, its predecessors, and its progeny. Clearly, *Desert Palace* should have jettisoned any vestige of the "but-for" causation rule in employment discrimination cases.

This Court should grant review as to both the questions concerning the timing nexus and nature of adverse employment actions in First Amendment retaliation cases.

III. ALSO REQUIRING THIS COURT'S REVIEW IS THE EXTENT TO WHICH PUBLIC EMPLOYEES HAVE A COGNIZABLE PROPERTY INTEREST WHEN A PUBLIC EMPLOYER SIGNIFICANTLY ALTERS THEIR PROFESSIONAL DUTIES AND STATURE, AND DENIES THEM ALL ACCESS TO GRIEVANCE PROCEDURES MANDATED BY EMPLOYMENT AGREEMENTS

The Louisiana courts, relying on federal court precedent, ruled that Petitioner was not deprived of a cognizable property interest in his employment, requiring procedural due process, even after being suspended with pay for seven (7) months and being denied all access to the grievance procedures that were mandated as part of his employment agreement with Respondent University. *See* App. 8a–9a (*citing Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985); and *Huang v. Board of Governors of Univ. of N. Carolina*, 902 F.2d 1134, 1141 (4th Cir.1990)). Even the truncated analysis of the Louisiana courts reveals a major split in authority among the federal circuits as to (1) whether (especially as regards tenured academics) a demotion or radical change in professional duties or stature can constitute a cognizable deprivation of property; and (2) whether denial of all access to a contractually-mandated grievance procedure for employees also constitutes a cognizable deprivation of property. The Louisiana courts answered these two inquiries in the negative, *see* App. 8a–9a, but both questions have spawned substantial discord in

federal case law.

1. The foundational decisions for this Court's protected property rights jurisprudence, especially for those teaching at institutions of higher learning, remains *Board of Regents of State Colleges v Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). The heart of these rulings was this Court's conclusions that "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 576–77. This Court also held that

> 'Property' interests subject to procedural due process protection are not limited by a few rigid, technical forms.... A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.... Explicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in light of the surrounding circumstances.

Perry, 408 U.S. at 601–02; *see also Roth*, 408 U.S. at 577.

Based on this language, some courts of appeals have held that an academic may suffer a cognizable property deprivation in situations where there is no reduction in salary, or in rank, because of an adverse employment action. In *Winegar v. Des Moines Independent Community School District*, 20 F.3d 895 (8th Cir.1994), the Petitioner, Winegar, had been an industrial arts teacher at the same high school for 19 years with an unblemished record when he became involved in an altercation with a student. Afterwards, he was

suspended for several days and then transferred to another school. He brought suit alleging deprivation of property in violation of the Due Process Clause because he was not afforded any type of hearing or a fair opportunity to respond to the charges of child abuse. The Eighth Circuit found that the deprivations—the suspension and the transfer—were significant, holding that "[t]he transfer, which might not implicate due process interests if executed for ordinary business or administrative reasons, must also enter into the calculus here. An employee can have a protected property interest in a benefit, such as a particular assignment or duty station, if he legitimately expects to continue in that assignment or duty station." 20 F.3d at 900 (citations omitted).

More recently, the Seventh Circuit has also recognized that tenured professors may have a property right in their professional stature that entitles them to due process incident to a dramatic change in professional duties. *See Wozniak v. Conry*, 236 F.3d 888 (7th Cir.2001). There, a tenured professor was barred from teaching any class, his research funds were canceled, and he was reassigned to manage a faculty web site. However, despite the fact that the university did not reduce his salary or formally change his title, the Seventh Circuit recognized that he was "effectively shuttled from the faculty to the administrative staff" and that his award of tenure was "as a faculty member and not just as an all-purpose employee equally suited to the classroom and the janitorial staff." *Id.*, at 889–90. The Court found that the professor had created a factual question as to "whether the university had deprived him of his professional stature, a form of property interest—for an employer that strips an employee of the ordinary incidents of the job, in a way that could lead a reasonable, self-respecting person to resign, has constructively discharged that person even if the employee's title and salary are unaffected." *Id.*, at 890. In *Sharp v. City of Houston*, *supra*, the Fifth Circuit held, in a § 1983

retaliation claim, that a transfer can be an actionable demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement. The court went on to hold that the jury reasonably determined that a transfer from the elite mounted patrol to a teaching post at the police academy was, objectively, a demotion.

The foundation of these precedents was the Court's decision in *Perry* that "[a] property interest in employment can also be created by implied contract, arising out of customs, practices and de facto policies." *Winegar*, 20 F.3d at 899 (*citing Perry*, at 601–02). This is a fundamental principle which the Louisiana courts have ignored in property rights cases such as Petitioner's, thus aligning themselves with the U.S. Fourth Circuit Court of Appeals, *see Huang*, 902 F.2d at 1141 (relying on authority from other circuits[17]); and *Fields v. Durham*, 909 F.2d 94, 98 (4th Cir.1990). At a minimum, there is a clear split between two circuits (the Seventh and Eighth) that would support the right of Dr. Rushing, in these circumstances, to make a cognizable property interest claim under the Due Process Clause insofar as he suffered a significant alteration of his professional duties and stature. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (undesirable reassignment may constitute a tangible employment action under Title VII); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (an adverse employment action does not have to be a dismissal to violate a public employee's First Amendment rights).

Petitioner is by no means suggesting, of course, that

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[17] *See Maples v. Martin*, 858 F.2d 1546, 1550–51 (11th Cir.1988); *Garvie v. Jackson*, 845 F.2d 647, 651 (6th Cir.1988); *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir.1985); *Volk v. Coler*, 845 F.2d 1422, 1430 (7th Cir.1988); *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir.1982).

every change in the conditions of employment would necessarily rise to the level of a cognizable property deprivation, triggering the procedural protections of the Due Process Clause under *Loudermill*. What Petitioner does submit, though, is that the mere fact that he did not suffer a loss in pay or compensation cannot be dispositive (as the Louisiana First Circuit held, *see* App. 9a, 16a, 17a) on this question. This case presents a superb vehicle for the Court to return to a question left open in *Roth* and *Perry*, and to resolve this conflict in the circuits.

2. Insofar as the Louisiana courts ruled that Petitioner had no cognizable property right in access to grievance procedures mandated by his employment agreement with Respondent University, *see* App. 9a, this, too, runs counter to this Court's procedural due process jurisprudence in the employment setting. *See Roth*, 408 U.S. at 577. In *Perry*, this Court held that, depending on the circumstances, a public university's non-contractual policies and practices could give rise to a property right. 408 U.S. at 601. Neither *Roth* nor *Perry* stated or made clear that certain rules or understandings—such as the right of a tenured public employee to have access to an employment grievance procedure—could represent a reasonable claim of expectation. However, access to a contractually-mandated grievance procedure would certainly appear to be a sort of provision that would qualify for constitutional protection under the procedural face of the Due Process Clause.

Lower courts have rejected cognizable property interests in other sorts of contractual expectations in the public employment context. *See Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1314 (3d Cir.1987); *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 422 (1st Cir.1986); *Goodisman v. Lytle*, 724 F.2d 818, 820–21 (9th Cir.1984); *Kilcoyne v. Morgan*, 664 F.2d 940, 942 (4th Cir.1981). But in each of these cases, the court of appeals

reserved the question of whether denial of access to a grievance procedure contained in the public employment agreement would rise to the level of a cognizable property deprivation. In other cases, circuit courts have held that where the contractual provision does not reflect a "trivial and insubstantial interest," it may give rise to a cognizable property right. *Ezekwo v. Health and Hospitals Corp.*, 940 F.2d 775, 782-83 (2d Cir.1991); *see also Ciambriello v. County of Nassau*, 292 F.3d 307, 313 (2d Cir.2002).

The Louisiana court's contrary interpretation of the Due Process Clause finds no support in this Court's jurisprudence, although this Court has not squarely addressed whether certain mutual understandings—particularly those foundational provisions granting access to a grievance procedure—may predicate a legally cognizable property interest. Certiorari is warranted to resolve this open question.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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February 4, 2005.

(NOT DESIGNATED FOR PUBLICATION)

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2003 CA 0871

DR. STEVEN RUSHING
VERSUS
THE BOARD OF SUPERVISORS OF THE
UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

JUDGMENT RENDERED ON MAY 14, 2004

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana

Trial Court No. 464,510

Honorable William A Morvant, Judge

*****

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Panel composed of Judges FRANK FOIL, BRADY M. FITZSIMMONS and EDWARD J. GAIDRY.

FOIL, JUDGE.

In this appeal, a university professor challenges the action of the trial court in granting summary judgment dismissing his due process, first amendment and retaliation claims against the university. In connection therewith, the professor contests the trial court's refusal to strike a police complaint levied against him by a fellow instructor from consideration as evidence on the motion. We affirm.

BACKGROUND

Dr. Steven Rushing, an associate professor of music employed by the University of Louisiana System at Southeastern University (SLU), filed a series of grievances against various SLU committees, faculty, staff and administrators. The first set of grievances stemmed from an administrative decision denying his request for approval to participate in an opera production. On November 11, 1998, Dr. Rushing filed a formal grievance with Dr. John Crain, President of SLU's Faculty Senate, complaining of numerous alleged flaws in the university's professional funding process. A second grievance notified Dr. David Evenson, the head of the music department, that Dr. Rushing intended to file another official grievance for incidents occurring after November 11, 1998. In a letter dated January 22, 1999, to Dr. Evenson and entitled "Grievance #3," Dr. Rushing charged the Faculty Grievance Committee with violating SLU's rules for failing to timely conduct hearings on the previous grievances. Dr. Rushing forwarded grievances #1, #2 and #3 to Dr. Sally Clausen, SLU's President, charging that SLU officials failed to conduct hearings and comply with procedures outlined in the Faculty

Handbook on his grievances. Dr. Clausen responded that she lacked authority to render a decision on the grievance.

On March 7, 1999, Dr. Rushing filed grievance #4 against Dr. Randy Moffett, SLU's Provost and a member of the Grievance Committee, alleging that he failed to timely conduct hearings and render decisions on the second and third grievances. Dr. Rushing's fifth grievance was filed against numerous SLU officials and the Grievance Committee, alleging that his prior grievances were improperly considered abandoned on erroneous procedural grounds.

On April 11, 1999, Dr. Rushing submitted his sixth grievance to Dr. Evenson, complaining about the removal of one of his students, Melissa LeBlanc. The student had been reassigned by Dr. Evenson to the studio of Scharmal Schrock, another SLU faculty member, after the student's mother complained that Dr. Rushing failed to keep up with her daughter's lessons. It is undisputed that on April 13, 1999, Dr. Rushing confronted Ms. Schrock at her studio and engaged in an angry tirade concerning the Ms. LeBlanc's removal in the presence of Ms. LeBlanc. Ms. Schrock later filled out a Witness/Victim Statement Form with the SLU Police Department regarding the incident. The incident prompted administrative review by SLU under its workplace violence policy.

Dr. Evenson issued a written reprimand to Dr. Rushing for his behavior during the April 13 incident. On April 26, 1999, Dr. Rushing was notified that he was being placed on leave with pay and was relieved of all teaching and other job duties pending an investigation of his job performance and conduct towards students and colleagues. In early June of 1999, Dr. Clausen appointed an ad hoc grievance committee to investigate Dr. Schrock's complaint under the workplace violence policy. Dr. Rushing was given

the opportunity to explain his version of the incident to the committee. On August 16, 1999, Dr. Rushing was restored to all of his teaching duties.

After conducting seven meetings, the ad hoc committee concluded that Dr. Rushing's conduct during the April 13 incident was inappropriate and unprofessional, but did not pose a credible threat. The committee recommended that Dr. Rushing be required to receive mandatory workplace violence training and that he be encouraged to seek anger management counseling.

On September 13, 1999, Dr. Rushing filed this lawsuit against SLU's Board of Supervisors (Board), challenging the April 26, 1999 suspension from his teaching duties with pay, asserting that the Board failed to provide him with his due process right to pre-deprivation notice and an opportunity to respond. He further charged that the suspension was done in retaliation for his filing of the six grievances. Additionally, Dr. Rushing charged that the university system failed to hear his grievances in accordance with its promulgated policy and due process, and claimed that he was entitled to have the grievances heard in accordance with those policies. Dr. Rushing sought to recover damages for mental. and emotional distress, anguish, anxiety, humiliation, embarrassment and damage to his reputation allegedly suffered by him as the result of his April 26 suspension and the denial of his due process rights.

Thereafter, on October 5, 1999, in accordance with the ad hoc committee's recommendation, Dr. Clausen ordered Dr. Rushing to undergo anger management counseling and to furnish her with reports from his counselor verifying that he was undergoing treatment. Approximately two weeks later, Dr. Rushing filed his seventh grievance with Dr. Evenson, complaining of two "new incidents" which caused him to be

aggrieved, presumably relating to the order to undergo anger management counseling and furnish evidence thereof, which he asserted were discriminatory and had been done to harass him.

By letter dated October 29, 1999, Dr. Rushing was notified that the Grievance Committee for the University of Louisiana System considered his appeal and affirmed SLU's action, denying him a hearing.

On November 23, 1999, Dr. Clausen again placed Dr. Rushing on leave with pay for failing to provide her with evidence of anger management treatment, and apprised him that he would remain at that status until the necessary documentation was presented to her. On December 21, 1999, SLU was furnished with a counselor's report indicating that Dr. Rushing had been treated for depression in the past. Dr. Clausen advised Dr. Rushing on January 6, 2000 that he was being placed on leave without pay because the report submitted did not comply with her November 23, 1999 directive, and because there was an ongoing. concern whether Dr. Rushing. posed any risk to the students, staff or faculty of the university. Dr. Rushing was notified that he was entitled to a hearing to contest the action, and a hearing date was set.

On January 23, 2000, grievance #8 was submitted by Dr. Rushing to Bobby Jindal, the President of the University of Louisiana System, complaining of the January 6 suspension and seeking reinstatement. The grievance was returned with the notation, "refused."

On January 31, 2000, a "Loudermill Hearing"[18] was held before a special committee convened for the purpose of

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[18] See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985).

providing Dr. Rushing an opportunity to present his side of the story as it related to Dr. Clausen's action taken on January 6. Dr. Rushing was present and represented by counsel. The committee recommended that Dr. Clausen obtain additional documentation to show that Dr. Rushing received a full psychiatric evaluation as requested, as well as the psychiatrist's opinions regarding Dr. Rushing's ability to work without restriction and whether he posed a risk to others. The Committee further recommended that Dr. Rushing be continued on leave with pay for at least thirty days, pending the production of the documentation.

On February 23, 2000, Dr. Clausen advised Dr. Rushing that his status was changed to leave with pay pending her receipt of the documentation recommended by the committee. Documentation was provided within the deadline, and Dr. Rushing's status was extended to receive additional clarifying documentation. On June 30, 2000, Dr. Clausen advised Dr. Rushing that his status of leave with pay was lifted as of that date, and that he could return to his regular duties.

In March of 2002, Dr. Rushing filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC), claiming that SLU discriminated against him by reason of his "disability" in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA). Several months later, he submitted his ninth grievance to Dr. Evenson, based upon the suspension of hearings on all prior grievances. The subject matter was specified to relate to salary and/or working conditions, lack of policies or misapplication or violations of SLU's rules.

On June 25, 2002, Dr. Rushing filed a supplemental and amended petition asserting claims of discrimination and retaliation in violation of the ADA and Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e, et seq., based on the filing of Grievance No. 7 and other "protected activity." He alleged SLU and the Board retaliated against him by suspending his rights to the grievance procedure, suspending him with and without pay, demanding that he seek documented anger management therapy and the refusal to conduct hearings on grievances number 8 and 9.

The Board filed a motion for summary judgment, and evidence was submitted in support of and in opposition to the motion. Dr. Rushing filed a motion to strike the police complaint form attached to the Board's supporting memorandum as an exhibit on the basis that it was not sworn or verified.

Both motions were heard on February 18, 2003. Thereafter, the trial court ruled in favor of the Board on both motions. This appeal, taken by Dr. Rushing, followed.

MOTION TO STRIKE

We first briefly address. Dr. Rushing's first assignment of error, in which he complains that the trial court erred in denying his motion to strike the police complaint form. Dr. Rushing asserted that the Witness/Victim Statement Form should not have been considered by the trial court in rendering the decision on the motion for summary judgment because it was unsworn and unverified. We find, however, that even if the trial judge erred in refusing to strike this piece of evidence, any such error would be harmless beyond a doubt. It is undisputed that Dr. Rushing's conduct in verbally confronting his fellow professor in front of a student in an angry manner prompted the April 26th suspension from his teaching duties with pay pending an investigation. The Witness/Victim Statement Form sets forth the specifics of the encounter. What was relevant for the purpose of the motion

for summary judgment was the fact that the encounter took place, not the specifics of that encounter. Accordingly, we find no reversible error in the trial court's refusal to strike the form from evidence.

SUMMARY JUDGMENT

This court reviews summary judgments *de novo* based upon the same criteria used by, the trial court in deciding whether summary judgment is appropriate. **Simmons v. Berry,** 98-0660, p. 4 (La. App. 1 Cir. 12/22/00), 779 So.2d 910, 913-914. Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions and affidavits on file show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C. P. art. 966B.

In assignment of error number two, Dr. Rushing contends that the trial court erred in granting the motion for summary judgment, asserting that he met his burden of showing that there are genuine issues of material fact as to whether the Board denied his due process rights by refusing to hear his grievances and by suspending him, and that the Board, by suspending him with and without pay, retaliated and discriminated against him for filing the grievances, this lawsuit and the EEOC charge.

1. DUE PROCESS CLAIMS

Dr. Rushing claims that his suspension without a prior hearing violated his right to due process. In **Cleveland Board of Education v. Loudermill,** 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the United States Supreme Court concluded that procedural due process guarantees generally entitle a public employee dismissible only for cause, such as a tenured employee, to a least a limited hearing

prior to his termination in order to tell his side of the story. To claim the protections of the due process clause under the Fourteenth Amendment to the United States Constitution or Article I Section 2 of the Louisiana Constitution, a claimant must show the existence of some property or liberty interest that has been adversely affected by state action. **Johnson v. Southern University,** 00-2615, p.6 (La. App. 1 Cir. 12/28/01), 803 So.2d 1140, 1144-45.

Here, Dr. Rushing was not terminated, nor did he suffer the loss of any compensation—it is undisputed that Dr. Rushing's pay was never interrupted. Courts have long held that any constitutionally protected employment interest a tenured employee has as a result of his employment contract is satisfied by payment of the full compensation due under the contract. **Huang v. Board of Governors of University of North Carolina,** 902 F.2d 1134, 1141 (4th Cir. 1990). It is clear that Dr. Rushing has not been deprived of a property interest by the university, and therefore, the trial court correctly dismissed the due process claims based on the suspensions. We next address Dr. Rushing's claims that his due process rights were violated by SLU's failure to hold hearings on his grievances in accordance with the terms of the university's Faculty Handbook. The due process clause does not vest a tenured faculty member with a property interest in every facet of his employment. See **Johnson v. Southern University & A & M College,** 00-2615, at p. 7, 803 So.2d at 1145. We find that an internal grievance procedure, contained in a faculty handbook, does not, as a matter of law, constitute a constitutionally protected property right. Therefore, we conclude the trial court properly dismissed Dr. Rushing's due process claims based on the alleged failure of the university to follow its internal grievance procedures.

2. FIRST AMENDMENT CLAIMS

Dr. Rushing contends that by refusing to hear his grievances, the Board violated his First Amendment right to free speech. He also insists that the university retaliated against him for filing the grievances in violation of the First Amendment. Generally, in order to prevail on either claim, a public employee must demonstrate that the speech involved a matter of public concern. See **Connick v. Myers,** 461 U.S. 138,, 147, 103 S.Ct 1684, 1690, 75 L.Ed. 708 (1983). The substance of grievances 1-5 relate to the university's decision not to fund Dr. Rushing's request to participate in an opera, an internal fiscal administrative decision, on a matter personal to Dr. Rushing. The remaining grievances derive from the re-assignment of one of Dr. Rushing's students, clearly a personal matter. Thus, we conclude that as none of the grievances constitute speech on a matter of public concern, Dr. Rushing cannot prevail on these claims as a matter of law, and summary judgment was properly entered.

3. RETALIATION CLAIMS UNDER THE ADA AND TITLE VII

Dr. Rushing submits that there exists a genuine issue of material fact as to whether the Board discriminated against him for filing a charge of discrimination with the EEOC. In order to establish *a prima facie* case of unlawful retaliation under Title VII or the ADA, a plaintiff must establish that (1) he engaged in a protected activity protected under Title VII or the ADA; (2) an adverse employment action occurred and (3) there is a causal connection between the protected action and the adverse action. **Seaman v. CSPH, Inc.,** 179 F.3d 297, 301 (5th Cir. 1999); **Long v. Eastfield College,** 88 F.3d 300, 304 (5th Cir. 1996). Once a plaintiff has established a *prima facie* case, the defendant must come forward with a

legitimate, nondiscriminatory reason for the adverse employment action. If the reason is advanced, the plaintiff must adduce sufficient evidence that the proffered reason is a pretext for retaliation. Ultimately, the employee must show that "but for" the protected activity, the adverse employment action would not have occurred. **Seaman v. CSPH,** 179 F.3d at 301.

Rushing claims that he participated in a protected activity when he filed Grievance #7 with SLU and a complaint of discrimination with the EEOC. He insists that his suspension was in retaliation for his filing of this grievance and that he can demonstrate the reasons advanced by SLU are a mere pretext for that retaliation. We disagree.

In this case, SLU established that it had a legitimate, non-retaliatory reason for suspending Dr. Rushing from his teaching duties, namely, concern for the safety of faculty, staff and students following Dr. Rushing's confrontational verbal altercation with a fellow music professor in front of a student. This incident triggered administrative review by the university pursuant to its workplace violence policy. The first suspension was ordered for investigative purposes; the remainder of the time that Dr. Rushing was on suspended status was due largely in part to his own failure to provide the university with documentation evidencing he had undergone anger management counseling and a full mental evaluation. In short, Dr. Rushing produced no evidence to show that absent the filing of his internal grievance, EEOC complaint and this lawsuit, the alleged retaliatory actions of SLU would not have occurred. Therefore, the decision of the trial court to dismiss these claims was correct.

CONCLUSION

For the foregoing reasons, we hold that the trial court correctly granted summary judgment in favor of the Board, dismissing all of Dr. Rushing's claims. All costs of this appeal are assessed to appellant.

AFFIRMED.

GAIDRY, J., dissenting in part and assigning additional reasons.

For the following reasons, I would reverse the judgment denying the motion to strike and reverse the summary judgment in part and affirm it in part. I therefore dissent in part, but join the majority in all other respects.

The incident of April 13, 1999 is of particular importance. Dr. Schrock's police report and complaint was what triggered administrative review under SLU's workplace violence policy. The *ad hoc* grievance committee appointed by Dr. Clausen concluded in its report of September 2, 1999 to Dr. Clausen that Dr. Rushing's conduct during the incident was "inappropriate and unprofessional," but that he did not pose a "credible threat" in terms of causing *actual* fear of physical harm.

Also of importance is that on September 15, 2001, Dr. Moffett sent Dr. Rushing a letter of agreement confirming his tenured faculty appointment for the 2001-2002 academic year, stating, "The terms of your employment are stated in the Southeastern Louisiana University Faculty Handbook...."[1]

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[1] A similar letter was sent to Dr. Rushing on October 2, 2002, for the 2002-2003 academic year.

The only evidence in the record relating to the prior terms of his employment consists of the advertisement for his initial non-tenured position, and the letters of offer and acceptance of that position, none of which even mention either the handbook or the grievance procedure.

Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 00-2507, p. 2 (La. 12/8/00), 775 So.2d 1049, 1050. And even after the significant changes in favor of summary judgment, the jurisprudence continues to uniformly hold that the granting of summary judgment is rarely appropriate for cases involving the judicial determination of subjective facts such as motive, intent, good faith, or knowledge. *See Vanderbrook v. Coachmen Industries, Inc.*, 01-0809, pp. 6-7 (La. App. 1st Cir. 5/10/02), 818 So.2d 906, 910-11.

THE MOTION TO STRIKE

Louisiana Code of Civil Procedure article 964 authorizes the use of a motion to strike, providing as follows:

> The court on motion of a party or on its own motion may at any time and after a hearing order stricken from any pleading any insufficient demand or defense or any redundant, immaterial, impertinent, or scandalous matter.

It might legitimately be questioned whether Dr. Rushing's motion to strike was a proper vehicle to challenge the admissibility of the police complaint form at issue. The complaint form itself does not constitute a defense but rather

an item of evidence, and cannot properly be categorized as a redundant, immaterial, impertinent, or scandalous allegation. But I need not further discuss that procedural point, as the motion should appropriately be treated as a written evidentiary objection to the complaint form.

Louisiana Code of Civil Procedure article 967(A) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The article further expressly requires that "*[s]worn or certified copies of all papers or parts thereof referred to in an affidavit* shall be attached thereto or served therewith." (Our emphasis.) A party may not utilize unsworn and unverified documents as summary judgment evidence. *Sanders v. J. Ray McDermott, Inc.*, 03-0064 p. 4 (La. App. 1st Cir. 11/7/03), So.2d , . A document which is not an affidavit or sworn to in any way, or which is not certified or attached to an affidavit, is not of sufficient evidentiary quality to be given weight in determining whether there are remaining genuine issues of material fact. *Id.; Robertson v. Northshore Regional Medical Center,* 97-2068, pp. 5-6 (La. App. 1st Cir. 9/25/98), 723 So.2d 460, 464. Likewise, an unsworn, uncertified document simply attached to a memorandum may not properly be considered by the court in determining a motion for summary judgment. *State v. Exxon Corporation,* 95-2501, p. (La. App. 1st Cir. 6/28/96), 676 So.2d 783, 787.

The Board interprets Dr. Rushing's objection to the complaint form as grounded in its hearsay nature, and attempts to characterize the item as relevant non-hearsay evidence by reason of its being offered not to prove the truth of its contents, but simply to demonstrate that the actions taken by SLU and the Board against Dr. Rushing were

justified based upon a reasonable perception of the matters asserted therein. I agree that the document may ultimately be relevant on that issue. But this begs the question of whether it was properly considered by the trial court for summary judgment.

I conclude that Dr. Rushing's contentions relating to the consideration of the complaint form, in the context of summary judgment, have merit.[2] As is clear from the trial court's reasons for judgment and the content of the complaint form itself, its consideration was important in the determination of whether genuine issue of material fact existed on the subjective issue of motivation for the suspensions. I dissent from the majority's ruling on the motion to strike, as the trial court's error was not harmless.

THE MOTION FOR SUMMARY JUDGMENT

DUE PROCESS CLAIMS BASED UPON THE GRIEVANCES

Dr. Rushing contends that he had a contractual right to the grievance procedure set forth in SLU's faculty handbook at the time he filed his grievances, and that this contractual right constitutes a property right of which he may not be deprived without due process. I agree with the majority that even if he had a contractual right to utilize the grievance procedure, such a right is simply not a property right under our law.

In point, our jurisprudence has consistently recognized that a grievance procedure set forth in a faculty handbook is a unilateral expression of employer policy, and

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[2] It is not necessary at this point to address the issues of the complaint form's relevancy and hearsay status in a context outside of summary judgment, such as in trial on the merits.

its mere publication does not evidence a meeting of the minds. *Mix v. University of New Orleans*, 609 So.2d 958, 961 (La. App. 4th Cir. 1993), *writ denied,* 612 So.2d 83 (La. 1993). *See also Schwarz v. The Administrators of the Tulane Educational Fund,* 97-0222, p. (La. App. 4th Cir. 9/10/97), 699 So.2d 895, 897-98; *Stanton v. Tulane University of Louisiana,* 00-0403, pp. 14-15 (La. App. 4th Cir. 1/10/01), 777 So.2d 1242, 1250-51, *writ denied*, (La. 4/12/01).

State law defines what constitutes a property interest subject to procedural due process protection. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). While compensation, overtime pay, and vested retirement benefits certainly constitute property rights, it is clear that any assumed obligation of an employer to provide an internal grievance procedure simply does not vest its employee with a property right under our law. Thus, SLU's alleged failure to strictly follow the grievance procedure outlined in the faculty handbook, and the Board's refusal to overrule its action in that regard, even after September 15, 2001, simply do not rise to the level of denial of procedural due process.[3]

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[3] *See Levine v. Torvik, 986* F.2d 1506, 1515 (6th Cir. 1993), *cert. denied, 509 U.S. 907,* 113 S.Ct. 3001, 125 L.Ed2d 694 (1993) ("A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable.") Whether the manner in which the grievances were handled amounts to denial of "academic due process" (a term used by Dr. Rushing in some of the correspondence in evidence), in terms of a breach of contractual rights to specific procedures, as opposed to constitutional due process, is a wholly different issue. *See generally Ailsa W.* Chang, Note, *Resuscitating the Constitutional "Theory of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 Stan. L. Rev. 915 (2001).

I also agree with the majority that Dr. Rushing had no liberty interest protected by due process under either the federal constitution or our state constitution regarding his various grievances. Dr. Rushing contends that a genuine issue of material fact exists as to whether his grievances related to matters of public concern. I must disagree that a factual issue is presented. Whether an expression involves a matter of public concern is a question of law, not fact. *Connick v. Myers,* 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 1690 n.7, 75 L.Ed.2d 708. Speech that does not relate to "any matter of political, social or other concern to the community" is not of public concern. *Connick,* 461 U.S. at 146, 103 S.Ct. at 1690. I join with the majority in concluding that none of the grievances relate to "matters of public concern," as a matter of law.

DUE PROCESS CLAIMS BASED UPON THE SUSPENSIONS

The United States Supreme Court has recognized that *de minimis* property interests do not trigger procedural due process protections. *See Goss v. Lopez,* 419 U.S. 565, 576, 95 S.Ct. 729, 737, 42 L.Ed.2d 725 (1975). Here, the nominal suspensions without pay were of relatively short duration and were *de facto* suspensions with pay, and no deprivation of due process occurred.

FIRST AMENDMENT RETALIATION CLAIM

The factual allegations of Dr. Rushing's petition are broad enough to encompass a claim for retaliation under 42 U.S.C. § 1983 for the exercise of his right to freedom of speech under the First Amendment to the United States Constitution and the corresponding language of Article I, § 7 of the Louisiana Constitution. As previously stated, none of

Dr. Rushing's grievances, including his "grievances against the grievance procedure," constitute speech on a matter of public concern, but rather each was "an employee grievance concerning internal office policy" or a grievance on matters of private concern. *Connick*, 461 U.S. at 154, 103 S.Ct. at 1693-94.[4] Thus, even if his suspensions amounted to adverse employment actions, his First Amendment retaliation claims based upon the filing of all his grievances have no merit.

THE ADA AND TITLE VII CLAIMS

In his EEOC charge, attached to and incorporated in his supplemental and amended petition, Dr. Rushing identified the discrimination forming the basis of his ADA and Title VII claims as commencing on November 29, 2001, and continuing thereafter. The stated cause of the discrimination was not specified as race, color, sex, religion, national origin, retaliation, age, or disability, but as "other." However, in describing the particulars of the charge, Dr. Rushing claimed that SLU violated the ADA "based on my disability by subjecting me to different terms and conditions of employment."

In support of its motion for summary judgment, the Board submitted the affidavit of Gene Pregeant, SLU's ADA/EEO compliance officer, documenting that as of September 4, 2002, SLU had never received a grievance, complaint or other notice from Dr. Rushing of any limitations caused by depression or any other claimed disability nor any request for related accommodations as required by the ADA. The affidavit of Mr. Pregeant, Dr. Rushing's own deposition

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[4] In *Mix*, 609 So.2d at 960, the court held that a university grievance procedure related only to "the regulation of ***internal management***," and therefore did not constitute a "rule" subject to the formalities of the Louisiana Administrative Procedures Act, La. R.S. 49:950, *et seq.* (Our emphasis.)

testimony, and the substance of his treating psychiatrist's reports demonstrate the absence of the element of notice of disability and consequent limitation required by the ADA. *See Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996). His ADA discrimination claim was therefore properly dismissed by the trial court. For the similar failure to establish *a prima facie* case as to the required element of his membership in a protected class, his Title VII discrimination claim based on his claimed "disability" also was properly dismissed.

However, based upon my review of the evidence in the record, I agree with Dr. Rushing that there is genuine issue of material fact as to his ADA and Title VII retaliation claims for any claimed incident of adverse employment action constituting retaliation in response to protected activity occurring after November 29, 2001, including the protected activity of the filing of the EEOC charge of March 14, 2002. *See Fabela v. Socorro Independent School District, 329* F.3d 409 (5th Cir. 2003). The summary judgment should therefore be reversed insofar as it dismissed those claims, but affirmed as to any such claims for alleged incidents of retaliation prior to November 29, 2001. Accordingly, I dissent in part from the majority's decision on the foregoing limited grounds.

BREACH OF CONTRACT

I further conclude that the allegations of Dr. Rushing's petition, as amended, are broad enough to state a cause of action for breach of contract against the Board, even though his petition does not expressly couch a claim in such terms. In that regard, I note that he has alleged that he is employed "with full tenure," that the actions of SLU and the Board relating to his various grievances have denied him "due process *guaranteed by the System Rules"* (academic or disciplinary due process), violated his "contractual rights to

the university's grievance process," which entitle him "to have his grievances heard in accordance with the promulgated policy," and that his suspensions were "illegal." The prayer of his original petition requests that the court order specific performance of the grievance procedure by the Board. And his affidavit further clarifies the allegations of his petition by specifically claiming that SLU's "breach of contract" caused him financial losses. Conclusory though this statement may be, when read in light of his petition's allegations and the evidence in the record, it is apparent that there are genuine issues of material fact as to whether the alleged failures of SLU and the Board to comply with SLU's grievance procedure after September 15, 2001 constituted breaches of the terms of Dr. Rushing's employment contract, apart from the alleged deprivation of constitutional due process.

Here, Dr. Rushing has demonstrated that the terms of his employment after September 15, 2001 are stated in the faculty handbook. The grievance procedure, if forming part of those terms, could very well constitute a contractual employment benefit (although not in the sense of a property right or perquisite). In so concluding, however, I must disagree with Dr. Rushing's argument that the principles articulated in *Knecht v. Board of Trustees for State Colleges and Universities*, 591 So.2d 690 (La. 1991), operate to vest any type of employment benefit set out in an employment handbook with the attributes of an enforceable obligation. The "contractual right" recognized in *Knecht* was expressly found to be a "property interest." *Id.* at 696.

There is genuine issue of material fact as to whether the terms of Dr. Rushing's tenured contract after September 15, 2001 included all of the provisions of the faculty handbook, including a contractual right to invoke a mandatory grievance procedure, and, if so, whether SLU and the Board have failed to fulfill their obligations in that regard.

As to the issue of whether his tenured employment contract *prior* to September 15, 2001, included a similar contractual right, I conclude that Dr. Rushing has failed to produce factual support sufficient to satisfy his evidentiary burden on that issue at trial. Accordingly, any claims relating to the handling of grievances filed prior to September 15, 2001 were properly dismissed, and to that extent I again join in the majority' decision. Under my analysis, this would leave only those claims relating to Grievance No. 9 for determination by the trial court.

The historic purpose of tenure, which originated in higher education, was the protection of academic freedom by preventing arbitrary or repressive dismissal. *Thorne v. Monroe City School Board, 542* So.2d 490, 491 (La. 1989). There is genuine issue of material fact as to whether the suspensions and related actions of SLU and the Board were arbitrary and constituted a breach of Dr. Rushing's contract as a tenured associate professor.[5] Summary judgment based upon the determination of such. disputed subjective facts was not appropriate, especially given the improper consideration of the police complaint form.[6]

---

[5] Dr. Rushing's affidavit and its exhibits sufficiently raise genuine issue of material fact relating to the motivation behind his suspensions following the issuance of the *ad hoc* committee report which concluded that he did not pose a "credible threat" by reason of the incident with Dr. Schrock. In particular, Dr. Rushing's sworn statement that during a meeting with Dr. Moffett on April 23, 1,999, to discuss Grievances Nos. 4 and 5, Dr. Moffett "tried to convince [him] to agree to suspend" all of his grievances filed as of that date (Grievances Nos. I through 5), advised Dr. Rushing that he was being placed on paid leave, and then reversed himself on the leave issue raises genuine issue as to the motive and justification for the subsequent suspensions.

[6] *See* La. C.C.P. art. 966(E).

The trial court erred in dismissing this action in its entirety by summary judgment. I would remand the following described claims as to which summary judgment was inappropriate: (1) those claims for breach of contract relating to the suspensions, (2) those claims for breach of contract relating to any grievances arising after September 15, 2001 (Grievance No. 9), and (3) any claims for retaliation under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, *et seq.*, arising after November 29, 2001.

In conclusion, however quixotic or unlikely of success the above listed claims may appear to be, summary judgment dismissing them was inappropriate, given the content of the record. I join, however, in the majority's assessment of all costs of this appeal to the plaintiff-appellant, Stephen Rushing, Ph.D.

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DR. STEVEN RUSHING

VERSUS NO. 464510 DIV. H

THE BOARD OF SUPERVISORS OF
THE UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

JUDGMENT

This matter came before the Court on February 18, 2003, on Motion for Summary Judgment by defendant and Motion to Strike by plaintiff. Present in open court were Winston Decuir, Russell W. Rudolph, and Michael D. Bass, attorneys for defendant; and J. Arthur Smith and Greg Toney, attorneys for plaintiff. After arguments of counsel were heard, the Court concluded that the law and evidence were in favor of the defendant, for the reasons orally assigned by the Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the plaintiff's Motion to Strike is denied and the defendant's Motion for Summary Judgment is granted, dismissing all of the plaintiff's claims with prejudice at plaintiff's cost.

Baton Rouge, Louisiana, this 17th day of March, 2003.

/s/ Honorable William Morvant.

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CIVIL SECTION XIII

DR. STEVEN RUSHING

V. NO. 464,510

THE BOARD OF SUPERVISORS OF
THE UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

EXCERPTS OF TRANSCRIPT

MOTION TO STRIKE DEFENDANT'S EXHIBIT NO. 7
MOTION FOR SUMMARY JUDGMENT

TUESDAY, FEBRUARY 18, 2003
THE HONORABLE WILLIAM A. MORVANT, JUDGE
PRESIDING

APPEARANCES:	FOR:
MR. J. ARTHUR SMITH, III	PLAINTIFF
MR. GREGORY A. TONEY	PLAINTIFF
MR. WINSTON G. DECUIR	DEFENDANT
MR. RUSSELL W. RUDOLPH	DEFENDANT
MR. MICHAEL D., BASS	DEFENDANT

REPORTED AND TRANSCRIBED BY:
BARBARA L. KEARNY, CCR NO. 87141

TUESDAY, FEBRUARY 18, 2003

* * * * * *

The Court: And I realize that summary judgment is not something that's going to be used as an alternative for trial or a substitution for trial, but as we stand right now we almost have from SLU's standpoint basically an admission, okay, these are the facts. we're not disputing that this is what happened, this is the chronology. and as I read your brief, when I was finished, I took the exhibits that were submitted on behalf of Dr. Rushing, I took the exhibits that were submitted on behalf of Southeastern, made up my own copy of all of them and sat and went through each document and compiled in a chronological order so I could get 'a better feel.

* * * * * *

I first looked at the original petition which was the grievances, and in reading the grievances and the due process argument that Dr. Rushing made in that regard, grievances 1 through 5 mostly pertain to the same subject matter. that was –the initial grievance was the funding and the grant procedure done by SLU basically to the exclusion of the Music Department and the Voice Department, and Dr. Rushing felt that they were not being given adequate funding and he had a grievance that he was submitting to the department head pursuant to the procedure outlined in the handbook.

* * * * * *

...The court is going to grant the Motion for Summary Judgment. The Court will sign judgment to that effect upon presentation.

END OF TRANSCRIPT

THE SUPREME COURT
OF THE STATE OF LOUISIANA

DR. STEVEN RUSHING vs. NO. 2004-C-1956

THE BOARD OF SUPERVISORS
OF THE UNIVERSITY OF LOUISIANA
SYSTEM (SOUTHEASTERN LOUISIANA
UNIVERSITY)

IN RE: Rushing, Steven Dr.; - Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. H, No. 464510; to the Court of Appeal, First Circuit, No. 2003 CA 0871.

November 8, 2004.

Denied.

Americans With Disabilities Act

42 U.S.C. § 12203(a)

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Civil Rights

42 U.S.C. § 1981

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title VII

42 U.S.C. § 2000e-3(a)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Supreme Court, U.S.
FILED
MAR 9 - 2005
OFFICE OF THE CLERK

No. 04-1062

In The Supreme Court of the United States

STEVEN RUSHING,

Petitioner,

versus

THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM (SOUTHEASTERN LOUISIANA UNIVERSITY),

Respondent.

On Petition For Writ Of Certiorari To The First Circuit Court Of Appeal Of The State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Court of Appeal correct in dismissing petitioner's due process claim when it determined that no federally protected property interest or state contract interest existed?

2. Did the Court of Appeal correctly apply *Connick v. Myers*, 461 U.S. 138 (1983) in determining that petitioner's request for funding to participate in theatrical productions was a matter of personal interest and not public concern?

3. Was the Court of Appeal correct in dismissing petitioner's retaliation claims under the Americans with Disabilities Act (ADA) and Title VII?

PARTIES TO THE PROCEEDINGS

The below listed individual and State governmental entity are the parties to this proceeding.

Steven Rushing - Plaintiff - Petitioner

The Board of Supervisors for the University of Louisiana System (Southeastern Louisiana University) - Defendant - Respondent

CORPORATE DISCLOSURE STATEMENT

No party to this proceeding is a non-governmental corporation.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner presents no compelling reasons to review this case on a writ of certiorari. Sup. Ct. Rule 10. Plaintiff asserts a misapplication of rules of law, a circumstance under which a petition for writ of certiorari is rarely granted. Sup. Ct. Rule 10.

Petitioner does not demonstrate a conflict with a decision of another court of appeal; does not present an important federal question that should be decided by this Court; and does not show any departure from the accepted and usual course of judicial proceedings in the lower courts. Sup. Ct. Rule 10(a)-(c). The lower courts' factual findings and application of established law were correct and properly supported by the record. Because petitioner has presented no compelling reason and no reason of the character warranting review of a matter, this Court should deny the petition for writ of certiorari.

Additionally, this case has not been decided by the Louisiana Supreme Court. Instead, that court declined to review this case. *Rushing v. Board of Supervisors of the U. of La. System,* 885 So.2d 1136 (La. 2004). Such a denial of review has no precedential value. *State v. Williams*, 800 So.2d 790 at n.3 (La. 2001). The Louisiana Supreme Court has therefore not "decided" any of the issues in this case as contemplated by Supreme Court Rule 10(b).

STATEMENT OF THE CASE

Relevant Proceedings Below

Petitioner filed the first of his nine (9) employment grievances with Southeastern Louisiana University on November 11, 1998. Petitioner filed his lawsuit in the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana on September 13, 1999, Docket number 464510, Honorable Judge William A. Morvant presiding. The defendant filed a Motion for Summary Judgment which was granted on March 17, 2003, and petitioner's suit was dismissed. Petitioner appealed the dismissal to the First Circuit Court of Appeal of the State of Louisiana which rendered judgment on May 14, 2004, affirming the District Court's decision.

Petitioner filed an Application for Rehearing with the First Circuit Court of Appeal on May 28, 2004. The Application for Rehearing was denied by the First Circuit Court of Appeal on June 28, 2004. Petitioner filed an Application for Writ of Review to the Louisiana Supreme Court on July 30, 2004. The Application was denied by the Supreme Court of the State of Louisiana on November 8, 2004. Petitioner filed this Application for Writ of Certiorari to the United States Supreme Court, and respondent appears to oppose.

Relevant Facts

The Board of Supervisors for the University of Louisiana System is the management board established by the Louisiana Constitution of 1974, Article 8, Section 6 responsible for those institutions placed under its management and control by Louisiana statutes. La. R.S. 17:3217. Among those universities is Southeastern Louisiana University [SLU], at which petitioner Rushing serves in a

tenured faculty position. The dispute which forms the basis of this action is a claim for monetary damages for alleged violations of civil rights, due process and retaliation by respondent in handling petitioner's employment grievances.

At issue in this case are nine grievances filed by petitioner against respondent SLU. Grievances 1, 2, and 3 were appeals of an administrative decision denying a request to allow petitioner to participate in an outside opera production. The first raised questions about the professional funding process to the President of the Faculty Senate. The second protested to the head of the Music Department. The third charged the faculty committee with violating the rules for a prompt hearing on Grievances 1 and 2. All three were forwarded to the President of the University, again raising the issue of failure to proceed along the internal grievance process in a timely manner. Grievance 4 was filed against a provost and a member of the grievance committee who had received the previous three grievances on failure to proceed and render decisions quickly in the second and third grievances. The fifth grievance was against numerous officials and the grievance committee indicating that the ruling on abandonment or procedural ground failures was in error. The sixth grievance was to the head of the Music Department regarding the removal of a student from the petitioner's tutorage. Evidence submitted showed that removal was due to a complaint by a parent and verbal tirades regarding the student. The committee in fact held numerous hearings on this and found that, while there was not a violence in the workplace threat to all parties, anger management and other measures should be taken by petitioner to ensure removal of the problem in the future. The final seventh grievance was filed with the Music

Department, alleging that its requirements that petitioner undergo anger management counseling and furnish evidence to the committee or the University that he had completed it, were done merely to harass him.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN AUTHORITY CONCERNING SPEECH THAT IS MOTIVATED IN PART BY PRIVATE INTERESTS, AND THE LOUISIANA COURT OF APPEAL CORRECTLY ANALYZED THE PUBLIC AND PRIVATE ASPECTS OF PETITIONER'S SPEECH AND APPLIED THE CORRECT LEGAL STANDARD.

Although petitioner has suggested that this Court should review the decision below based upon various purported splits in authority, this case does not squarely present a split in authority. Indeed, this case in no way created nor contributed to any split in jurisprudential authority. This case was decided by the Louisiana First Circuit Court of Appeal in an opinion clearly marked "Not Designated for Publication." Such opinions may not be cited, quoted, or referred to by any counsel, or in any argument, brief, or other materials presented to any court (except in continuing or related litigation). Rule 2-16.3, Louisiana Uniform Rules of the Courts of Appeal. As such, unpublished opinions cannot represent a "split in authority" since they have no precedential value whatsoever.

Petitioner further argues that (1) the Louisiana court erred by following a line of Fifth Circuit cases from which that circuit has since retreated and (2) there is a "deep and intractable split in authority concerning the role of private

motivation" in analyzing a public employee's speech. Neither of these assertions is correct.

Petitioner argues that the Louisiana First Circuit Court of Appeal held that "speech containing any element of private interest, however small, necessarily cannot also be of public concern. . . ." Petitioner's Brief at p.10. However, the Court of Appeal made no such ruling. Instead, the Court of Appeal held that, under the facts of this case, Dr. Rushing's speech was wholly on a personal matter under the test set forth in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Thus, the court found that no mixed motive existed in Dr. Rushing's speech.

Furthermore, there is no split in authority on the issue of mixed motive speech. Petitioner claims that the Louisiana court followed jurisprudence from the Fifth Circuit Court of Appeals which is at odds with the law in other circuits. This is not the case. The jurisprudence in the various circuits is consistent in holding that speech which has a mixed motive (i.e., addressed matters of both public and private concern) is protected. In *Kennedy v. Tangipahoa Parish Library Board of Control,* 224 F.3d 359 (5th Cir. 2000), *rehearing en banc denied*, 99-30277, 11/16/00, 224 F.3d 359 (5th Cir. 2000), the Fifth Circuit conducted an exhaustive review and analysis of its earlier jurisprudence on First Amendment retaliation claims by public employees. The court concluded, in part, that

> the content of the speech may relate to the public concern if it does not involve *solely* personal matters or strictly a discussion of management policies that is only interesting to the public by virtue of the manager's status as an arm of the government. *Kennedy v. Tangipahoa Parish Library Bd. of Control, supra,* at 372, emphasis supplied.

Thus, the Fifth Circuit did not hold, as petitioner asserts, that "any private motivation or interest to the speech essentially disqualifies it from 'public concern' status." Petitioner's Brief at p. 14. Instead, the Fifth Circuit rule is that speech is not of public concern if it involves "solely" personal matters. Speech motivated by a mix of personal and public concerns *is* protected by the First Amendment under the Fifth Circuit's jurisprudence. Thus the Fifth Circuit did not, as Petitioner claims, "retreat" when it explicitly stated that speech which contains an element of personal interest can be protected by the First Amendment. (*Johnson v. Louisiana*, 369 F.3d 826, 831 at n.6 (5th Cir. 2004).

This is entirely consistent with the Supreme Court's standard set forth in *Connick* and with the jurisprudence of other circuits on the matter. See, e.g., *Mullin v. Town of Fairhaven*, 284 F.3d 31, 39 (1st Cir. 2002) (finding First Amendment protection when the plaintiff had mixed motives); *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997) (noting that *Connick* indicates that a speaker's motive is often relevant but not dispositive in determining whether speech is of public concern); *Farhat v. Jopke*, 370 F.3d 580, 592 (6th Cir. 2004) (noting that the speaker's motive is not dispositive); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1264 (7th Cir. 1988) (holding that the employee's motive is relevant but not dispositive); *Pool v. Van Rheen*, 297 F.3d 899 (9th Cir. 2002) (holding that a letter addressing both issues of personal and private concern was protected by the First Amendment); and *Hulen v. Yates*, 322 F.3d 1229, 1238 (10th Cir. 2003) (holding that speech which touches on matters of public concern does not lose protection merely because some personal concerns are included). Thus, the "split of authority" claimed by petitioner does not exist.

II. PETITIONER HAD NO ADVERSELY AFFECTED INTEREST ENTITLING HIM TO DUE PROCESS PROTECTION UNDER EITHER THE FEDERAL CONSTITUTION OR STATE LAW.

This Court has held that

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972).

Petitioner cites two cases for the proposition that an academic may suffer a cognizable property deprivation as a result of employment actions which involve no loss in rank or salary: *Winegar v. Des Moines Independent Community Sch. Dist.*, 20 F.3d 895 (8th Cir. 1994), *cert. denied*, 513 U.S. 964, 115 S. Ct. 426, 130 L. Ed. 2d 340 (1994); and *Wozniak v. Conry*, 236 F.3d 888 (7th Cir. 2001), *cert. denied*, 533 U.S. 903, 121 S. Ct. 2243, 150 L. Ed. 2d 231 (2001). However, since property interests are created by state law, the analysis in each case must begin with what interests are protected by the law of the state at issue. In *Winegar*, the Eighth Circuit considered the case of a teacher who had a protected property interest in his employment by virtue of his continuing contract under Iowa law. *Winegar, supra*, at 899. In *Wozniak*, the Seventh Circuit analyzed property interests a professor had under "[Illinois] state law and the University's regulations." *Wozniak, supra*, at 890.

Louisiana courts have recognized that the due process clause does not provide a tenured faculty member with a property interest in each and every facet of his employment. In *Johnson v. Southern University*, 803 So.2d 1140 (La. App. 1st Cir. 2001), a Louisiana court of appeal considered the due process claim of a tenured professor who had been reassigned to teach only certain classes. The court held:

> There are no statutes, regulations or cases supporting Johnson's claim that he possesses a property interest in his class assignments. Moreover, Johnson does not claim that his contract with Southern University hampered the discretion of university officials to revise his class assignments. Absent a contractual provision limiting Southern University's right to reassign Johnson's classes, Johnson has no property interest in his particular class assignments. *Johnson, supra*, at 1145.

Petitioner's reliance on *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999), and other cases concerning retaliation claims under Title VII is wholly inappropriate. Whether a given adverse employment action could constitute retaliation under Federal employment discrimination law has absolutely no bearing on whether that same action would deprive the employee of a property right under state law.

Petitioner correctly noted that courts have rejected cognizable property interests in various contractual expectations in public employment.[1] In the two opinions

[1] Of the cases cited for this proposition by petitioner, in *Lovelace v. Southeastern Mass. U.*, 793 F.2d 419 (1st Cir. 1986); *Goodisman v. Lytle*, 724 F.2d 818 (9th Cir. 1984); and *Kilcoyne v. Morgan*, 664 F.2d 940 (4th

(Continued on following page)

cited by petitioner in which courts did find Due Process protection for the employee, *Ezekwo v. Health and Hospitals Corp.*, 940 F.2d 775 (2d Cir. 1991); and *Ciambriello v. County of Nassau,* 292 F.3d 307 (2d Cir. 2002), the public employees were denied a position of higher rank and salary. However, petitioner was not demoted in rank, nor did he lose any compensation.

Petitioner Rushing's complaint that SLU's 'suspension' without prior hearing violated his due process is in error, and the First Circuit properly found so. *Cleveland Board of Education v. Laudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), clearly provides that procedural due process entitles a public employee dismissed for cause only to a limited hearing prior to termination to present his version of the events. As the First Circuit noted, Dr. Rushing was never terminated nor suffered any loss of compensation. His pay was never interrupted. The First Circuit properly noted that a tenured employee's protected employment interest is satisfied by payment of his full compensation due. *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134 (4th Cir. 1990). Therefore, the First Circuit was correct in finding that petitioner, having not been deprived of a property interest, has not been denied due process required under *Cleveland*.

Cir. 1981) the respective courts found that each of the plaintiffs did not have any interest protected by the Due Process clause. In *Kovats v. Rutgers, The State University*, 822 F.3d 1303 (3d Cir. 1987), the court did not make any finding as to whether a property right existed, but instead remanded the case because the district court did not address whether the plaintiffs had a property interest protected by the Due Process clause. In none of these cases did the court "reserve" the question of a property interest in a grievance procedure as petitioner suggests at pp. 29-30 of his brief.

The First Circuit was also correct in finding that due process violations did not occur with the failure to hold any additional hearings on those multiple grievances identified in the fact pattern and petitions. See *Johnson id.* at 1145. Therefore, the First Circuit was correct in upholding the trial court's dismissal of the claim of failure to follow completely an internal grievance process.

III. THERE WAS NO VIOLATION OF PETITIONER'S FIRST AMENDMENT RIGHT TO FREE SPEECH SINCE HIS GRIEVANCES WERE NOT MATTERS OF PUBLIC CONCERN.

The First Circuit additionally was correct in dismissing Dr. Rushing's argument that the failure to hear those grievances was a violation of his First Amendment rights to free speech and/or retaliation for filing of such grievances in violation of the First Amendment. The First Circuit Court properly noted that the employee must show that the speech involved a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). As outlined in the fact patterns, grievances 1-5 were University decisions not to fund a request to participate in an opera. The court noted that this is an internal fiscal administrative decision purely personal to the petitioner. The remaining grievances identified in the fact pattern derive from a reassignment of a student from the petitioner to another professor, again clearly a personal matter. Therefore, the court correctly concluded that these speech matters were not matters of public concern. Consequently, Dr. Rushing could not prevail as a matter of law and summary judgment.

IV. RESPONDENT DID NOT ENGAGE IN UNLAWFUL RETALIATION AGAINST PETITIONER UNDER TITLE VII OR THE AMERICANS WITH DISABILITIES ACT (ADA) SINCE THERE WAS A LEGITIMATE REASON FOR SUSPENDING PETITIONER FROM HIS TEACHING DUTIES.

Lastly, the First Circuit addressed the petitioner's retaliation claims under either American with Disabilities Act (ADA) or Title VII, indicating there was no issue of material fact regarding the actions in his charge of discrimination with the EEOC. Again, the First Circuit was correct in identifying that, in order to do so, the petitioner had to establish that (1) he engaged in a protected activity under Title VII or the ADA, (2) an adverse employment action occurred, and (3) there was a cause or relationship between the two. *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999), and *Long v. Eastfield College*, 88 F.3d 300 (5th Cir. 1996). If the plaintiff establishes a prima facia case, the defendant then is charged with coming forward with legitimate, non-discriminatory reasons for the adverse employment action, and the plaintiff must offer sufficient evidence to show that the defendant's reason is merely pretext. It is a but-for test as identified in *Seaman, id.* The petitioner alleges that the Grievance No. 7 and complaint of discrimination with the EEOC is the protected activity and that a suspension was in retaliation of the filing of this process. The First Circuit and the District Court were correct in disagreeing with petitioner's claims. They found that the University had a legitimate, non-retaliatory reason for the suspension of teaching duties, clearly identifying safety of faculty, staff and students following petitioner's verbal altercations with other professors and students. There was an administrative review regarding respondent's workplace violence policy as outlined within

the fact pattern. A first suspension was ordered purely for investigative purposes. The remainder of the time that petitioner was on suspension was due to petitioner's own failure to provide sufficient documentation that he in fact had met the requirements of counseling and evaluation. Therefore, both the District Court and the First Circuit were correct in finding there was no evidence to show, absent a filing of the internal grievance, EEOC complaint, and lawsuit, that these actions would not in fact have still occurred. Therefore, the First Circuit was correct in all matters and the writ must be denied.

CONCLUSION

The District Court and the First Circuit Court of Appeals properly held that the due process rights on all issues raised by petitioner were not in fact violated under State or Federal law and properly granted summary judgment dismissing this case in toto. A writ to the Louisiana Supreme Court was denied unanimously. This Court should deny a Writ for Certiorari in this matter.

Respectfully submitted,

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APPENDIX

(NOT DESIGNATED FOR PUBLICATION)

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2003 CA 0871

DR. STEVEN RUSHING

VERSUS

THE BOARD OF SUPERVISORS OF THE

UNIVERSITY OF LOUISIANA SYSTEM

(SOUTHEASTERN LOUISIANA UNIVERSITY)

APPLICATION FOR REHEARING FILED MAY 28, 2004

REHEARING DENIED JUNE 28, 2004

Appealed from the

First Circuit Court of Appeal

Honorable Frank Foil, Brady M. Fitzsimmons
and E. James Guidry, Judges

* * *

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Uniform Rules of Louisiana Courts of Appeal, Rule 2-16.3 Publication and Citation

A. A formal opinion of a Court of Appeal shall be designated for publication unless a majority of the panel determines otherwise.

B. A memorandum opinion or a summary disposition of a Court of Appeal shall not be designated for publication except by unanimous vote of the panel.

C. Opinions and dispositions marked "Not Designated for Publication" shall not be cited, quoted, or referred to by any counsel, or in any argument, brief, or other materials presented to any court, except in continuing or related litigation. Opinions marked "Not Designated for Publication" shall be filed in the clerk's office as public records.

D. The panel shall reconsider its decision not to publish an opinion upon the request of the trial judge or a party, provided that the request and reasons therefore are made in writing within the delays for rehearing following the rendition of the opinion.

LOUISIANA CONSTITUTION OF 1974, ARTICLE 8, SECTION 6

Section 6. Board of Supervisors for the University of Louisiana System

Section 6. **(A) Creation; Functions.** The Board of Supervisors for the University of Louisiana System is created as a body corporate. Subject to powers vested by this Article in the Board of Regents, it shall have supervision and management of state colleges and universities

not managed by a higher education board created by or under this Article.

(B) Membership; Terms. The board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

Louisiana R. S. 17:3217 – University of Louisiana System

The University of Louisiana system is composed of the institutions under the supervision and management of the Board of Trustees for State Colleges and Universities as follows:

(1) Grambling State University at Grambling.

(2) Louisiana Tech University at Ruston.

(3) McNeese State University at Lake Charles.

(4) Nicholls State University at Thibodaux.

(5) Northeast Louisiana University at Monroe.

(6) Northwestern State University of Louisiana at Natchitoches.

(7) Southeastern Louisiana University at Hammond.

(8) University of Southwestern Louisiana at Lafayette.

(9) Any other college, university, school, institution or program now or hereafter under the supervision and management of the Board of Trustees for State Colleges and Universities.

(3)

No. 04-1062

Supreme Court, U.S.
FILED
MAR 16 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STEVEN RUSHING,
Petitioner

v.

THE BOARD OF SUPERVISORS
OF THE UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

On Petition for A Writ of Certiorari
To the First Circuit Court of Appeal of
The State of Louisiana

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent does not appear to seriously contest that Petitioner's arguments implicate weighty constitutional or statutory issues which merit this Court's review, especially in light of this Court's recent grant of certiorari in *Garcetti v. Ceballos* (U.S. S.Ct. Docket 04-473) (cert. granted Feb. 28, 2005). Instead, Respondent is reduced to arguing that this case is an inappropriate vehicle for resolution of the issues raised, based on the lower courts' factual findings as to the nature of the speech made by the Petitioner as a public employee, and the Louisiana University's response to Dr. Rushing's grievances. Respondent's attempt to render this case factually *sui generis* should be unavailing.

This case presents the same complex of facts, and at least one common legal issue, with that already granted for review in *Garcetti*. Even if this Court were indisposed to grant plenary review here, this Petition should be held pending disposition of *Garcetti*. At a bare minimum, Dr. Rushing's case presents the same threshold question of whether a public employee's speech, which has a partially private motive, is nonetheless disqualified as being of "public concern," within the meaning of this Court's holding in *Connick v. Myers*, 461 U.S. 138 (1983). Additionally, Petitioner raises significant questions as to the contours of this Court's employment retaliation jurisprudence and cognizable property rights for academics at public universities. Review should be granted.

1. On February 28, 2005, this Court granted review in *Garcetti v. Ceballos*, docket 04-473 (U.S. Feb. 28, 2005). As denominated by the Petitioner in that case, the Questions Presented for this Court's review were:

> 1. Should a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment, be cloaked with First Amendment protection simply because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in "as a citizen," in accordance with this Court's holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983).
>
> 2. Is immediate review by this Court necessary to address the growing inter-circuit conflict on the question of whether a public employee's purely job-related speech is constitutionally protected, especially where the lack of uniformity dramatically impacts the ability of all public employers to effectively manage their respective agencies?

Garcetti v. Ceballos, Petition for Writ of Certiorari, at (i) (U.S. 04-473) (filed Oct. 1, 2004).

In the facts underlying that case, Ceballos was a deputy district attorney who was assigned to investigate accusations that a deputy sheriff had lied, or, at a minimum, "grossly misrepresented the facts" in swearing out a search warrant affidavit. *Ceballos v. Garcetti*, 361 F.3d 1168, 1171 (9th Cir. 2004). Ceballos prepared a memorandum reporting his findings. He was later called upon, by defense counsel, to testify at a suppression hearing. By virtue of doing so, Ceballos claimed that he was subject to retaliatory action by his employer. *See id.* at 1171–72. On defendant's summary judgment motion, the district court ruled that the relevant

speech was not of "public concern." The court of appeals reversed, holding that the speech involved was of public concern, notwithstanding Ceballos's private motivations in making it, that the matter involved the internal operating procedures of the Los Angeles district attorneys' office, or that it was made in furtherance of an employment responsibility. *See id.* at 1173–76. The court of appeals expressly rejected a *per se* rule that would categorically deny protection for speech that occurs within the scope of employment responsibilities. *See id.* at 1175–78. This Court presumably granted review to resolve this threshold inquiry for public employee speech as being of "public concern."

2. Respondent's submissions notwithstanding, Dr. Rushing's public statements—issued in the form of grievances to his university—are analytically similar to those of Respondent in *Garcetti*. Dr. Rushing's first grievance concerned the basis and rationale "for professional funding through the Research and Grants Committee of Southeastern Louisiana University" and whether such complied with "the principles of intellectual and scholarly merit and . . . equality of access to funding for all full-time University faculty." Pet. App. 2a. Petitioner's grievance applied not only to his own personal situation—in regards to the University's grant support for a creative endeavor, in particular, and other public performances and arts funding, in general – but also "to other members of the faculty on grounds related to our membership in a particular group . . . ." *Id.*

The Louisiana court of appeals held that Petitioner's speech "relat[ing] to the university's decision not to fund Dr. Rushing's request to participate in an opera, an internal administrative decision, on a matter personal to Dr. Rushing," and thus was not a matter of public concern. Pet. App. 10a. This establishes precisely the same *per se* rule of

disqualification for speech dealing with "internal matters" or "scope of employment responsibilities," rejected by the *Garcetti* court of appeals, and exactly the issue accepted by this Court in that Petition. It is simply disingenuous for the Respondent to suggest that Dr. Rushing's case is so peculiarly fact-bound as not to be potentially affected by any ruling this Court may make in *Garcetti*.

3. The Petition also raises significant questions concerning this Court's employment retaliation jurisprudence and the cognizability of property interests of academic teaching, research and service at public universities, separate and apart from the First Amendment issues discussed above. For example, Respondent appears to concede that the relevant standard employed by the Louisiana courts, in the proceedings below, was the "but for" test of causality for employment retaliation, followed by the U.S. Court of Appeals for the Fifth Circuit, in such cases as *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999); *See* Op. Cert. at 11. As Petitioner has already explained, *See* Pet. 18–24, use of the "but for" test of retaliation causality is a minority position taken by only a handful of circuits, and appears to fundamentally contradict this Court's recent ruling in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003). Petitioner submits that if the Louisiana courts had applied a different standard of retaliation causation, they may well have reached a different result in this case. By its silence, Respondent apparently agrees.

Lastly, Respondent attempts to paper over a conflict in the circuits concerning cognizable property rights for academics at public universities who are the subject of employment action that does not necessarily result in a change in rank or pay. In *Winegar v. Des Moines Independent Community School District*, 20 F.3d 895 (8th

Cir. 1994), and in *Wozniak v. Conry*, 236 F.3d 888 (7th Cir. 2001), courts of appeals have recognized that teachers at public institutions had a cognizable property interest in the nature of their professional duties, not just their nominal pay grade or rank. As Petitioner has already discussed, *See* Pet. 25–30, he is not asserting a property interest in every aspect of his employment relationship with a public university, but only in regards to these essential characteristics of his teaching and research duties, as well as his access to the grievance procedures promised him as a condition of employment.

CONCLUSION

The petition should be granted, or, in the alternative, held pending the disposition of the petition in *Garcetti v. Ceballos*, No. 04-473.

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